

**Interpreting Authority:
Do States Interpret International
Law Differently to Create Legal
Authority in Decisions to
Intervene for Humanitarian
Concerns?**

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ABSTRACT

This thesis examines how a state's domestic legal framework interprets international law to create legal authority when deciding to use force or not for humanitarian reasons. It argues that neoclassical realism, with its emphasis on the domestic level of analysis, can explain the role of legal interpretation during the legal-political process which leads to different interpretations and applications of international law at the domestic level. The value of this undertaking is that by focusing on the importance of legal interpretation and its ability to justify or affect legal change, the research identifies points of interaction between different legal regimes and the interpretive role of law during foreign policy formation. Interaction is essential when there is a need to integrate different legal norms related to the contestation over the protection of human rights during regional conflict.

To demonstrate this the research comparatively analyses the United States and France's legal institutions, in contrast to international law, when deliberating foreign policy, using four civil conflicts as a case study of humanitarian intervention – the Liberian civil war (1989), Operation Restore Hope (1992 Somalia), Opération Turquoise (1994 Rwanda) and the conflict in Côte d'Ivoire (2002-present). The conflicts provide varying examples of interventions to human rights abuses that proliferated following the end of the Cold War to the emergence of the Responsibility to Protect Doctrine ("R2P"). Each conflict relates directly to legal-political challenges involved in the formation of foreign policy with state legal strategies and international law during this period.

This approach also considers a variation in the traditional meaning of power and rule structures inherent in realist theory, which has traditionally measured power in terms of military capabilities or economic strength. It considers that the allocation of power can also be witnessed in a state's legal framework, which in turn challenges the constructivist theory of 'anarchy is what states make of it' (Wendt 1992).

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Introduction

Although written within the framework of twentieth century thought on international legal study and foreign policy analysis concerning human rights, this thesis deals with issues which have a wider relevance for humanitarian concerns today - issues such as the distinction between universal moral and legal duties as well as the role of the state concerning intervention decisions. There are significant methodological considerations that this thesis examines to address the current gap between theoretical and empirical research in legal study and foreign policy analysis. This explanation is necessary to reconcile different institutional processes – law and politics. The study of this under-researched area allows for an original interdisciplinary perspective which helps to inform and develop an understanding of how a state interprets international law within the context of a state's domestic legal framework, and therefore how state and international law interact simultaneously in foreign policy to effect humanitarian concerns.

During the 1990s the use of force for humanitarian concerns in Liberia, Somalia and, with qualification Rwanda, proved to be controversial both when intervention happened and when it failed to happen.¹ International

¹ For instance see: Gershoni Yekutieli 'War Without End – The Prolonged Wars in Liberia' (1997) Vol 40, No. 3 *African Studies Review* 55, 63-64 (discusses the ineffectiveness of the international community and why the United States should have intervened in Liberia). Walter H. Kansteiner, 'Africa in the 1990s' in Azrael, Jeremy R. and Emil A. Payin (eds) *U.S. and Russian Policymaking With Respect to the Use of Force* Rand Publications 2009 (Kansteiner was Director for African Affairs at the National Security Council during the Liberia and Somalia conflicts); Jeffrey Clark, 'Debate in Somalia.' (1993) 72 (1) *Foreign Affairs* 109; as well as the 1992 United Nations Security Council Resolution 767, S/RES/767, which notes the deteriorating

covenants on civil and political rights² and economic, social and cultural rights³ introduced as part of the Universal Declaration of Human Rights (1948)⁴ attempted to address this controversy. Whilst these covenants emerged as quasi-legal international mechanisms for enforcing and protecting human rights within the international system, at the state level there were no formal legal guidelines or legal mechanisms for humanitarian intervention decisions in place.⁵ Following the emergence of the Danish Institute Report (1999) and the Responsibility to Protect Doctrine (2001),⁶ there was agreed international acceptance that human rights violations should be protected by a responsible international

political and humanitarian situation in Somalia at the time. Michael Barnett, 'The UN Security Council, Indifference and Genocide in Rwanda' (1997) 12(4) *Culture Anthropology* 551; Romeo Dallaire *Shake Hands with the Devil: The Failure of Humanity in Rwanda* De Copa Press 2004; Nicholas Wheeler, *Saving Strangers: Humanitarian Intervention in International Society* Oxford University Press 2000. The empirical chapters in Section Four discuss these humanitarian concerns in detail. Of note Bosnia was also considered problematic during this period (United Nations Security Council Resolution 770 adopted on 13 August 1992 (S/RES/770), wherein the Security Council recognised the humanitarian situation in Bosnia, as well as Sarajevo and Herzegovina.

² International Covenant on Civil and Political Rights (ICCPR) adopted 16 December 1966 by General Assembly Resolution 2200A (XX) <http://www.ohchr.org> accessed 15 July 2015.

³ International on Economic, Social and Cultural Rights (ESCR) adopted 16 December 1966 by General Assembly Resolution 2200A (XXI) <http://www.ohchr.org> accessed 15 July 2015

⁴ United Nations General Assembly Resolution 217 (A/RES/3/217 A) was adopted on December 10, 1948, to promote the Universal Declaration of Human Rights, <http://un-documents.net/a3r217a.htm> accessed 15 July 2015. Other covenants include the Convention on the Prevention and Punishment of Genocide adopted 9 December 1948 as General Assembly Resolution 260 (III) A (www.legal.un.org accessed 15 July 2015) and the Geneva Conventions which bans torture (www.icrc.org accessed 15 July 2015)

⁵ This remains a contemporary problem. For example see Amos N. Guiora, 'Humanitarian Intervention and Sovereignty Under the Umbrella of Geopolitics' 2013 34 (2) *U. Pa. J. Int'l L.* 410, 422 "a lack of clear criteria as to when intervention is justified, if not required, suggests that the question is one of interpretation, subject to specific circumstances and particular interests."

⁶ Danish Institute of International Affairs, December 7, 1999, *Humanitarian Intervention: Legal and Political Aspects*; submitted to the Minister of Foreign Affairs, Denmark (hereafter *The Danish Report*). Gareth Evans and Mohamed Sahnoun (Co-Chairs) *The Responsibility to Protect*, Report of the International Commission on Intervention and State Sovereignty December 2001 (frequently known as R2P and hereafter referenced as ICISS 2001). Both are discussed more fully in Section Three.

community.⁷ During this period, respectfully however, there are further discussions of the need for human rights protection but the international community does not identify an effective legal mechanism for how that need was to be met.⁸

Even today the formulation and implementation of decisions to use force based in human rights have a place in foreign policy.⁹ Yet consensus among states remains elusive and identifying the most effective mechanisms to meet the goals of foreign policy for humanitarian intervention is still a challenge.¹⁰ For instance, how can states agree that

⁷ Security Council Resolution 1674 (2006), reaffirms the 2005 World Summit regarding “the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.” Alex Bellamy ‘Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit’ (2006) 20(2) *Ethics & International Affairs* 143; Alex Bellamy and Paul D. Williams *Protecting Civilians in Uncivil Wars* (2009) Working Paper Working Paper No. Program on the Protection of Civilians, Asia-Pacific Centre for the Responsibility to Protect; Ramesh Thakur ‘Intervention, Sovereignty and the Responsibility to Protect: Experiences from ICISS’ 2002 33, no. 3 *Security Dialogue*, 323.

⁸ Ibid; Simon Chesterman *Just War or Just Peace? Humanitarian Intervention and International Law* Oxford University Press 2001; Jack Donnelly ‘The Social Construction of International Human Rights’ in Tim Dunne and Nicholas J. Wheeler (eds) *Human Rights in Global Politics* Cambridge University Press 1999; Martha Finnemore *The Purpose of Intervention: Changing Beliefs about the Use of Force*. Cornell University Press 2003; Peter J. Katzenstein *The Culture of National Security: Norms and Identity in World Politics* Columbia Press 1996; Ramesh Thakur ‘No more Rwandas’: intervention, sovereignty and the responsibility to protect’ (2004) *Humanitarian Exchange Magazine*. Issue 26, 4; Stephen D. Krasner *Problematic Sovereignty: Contested Rules and Political Possibilities* Columbia University Press 2001; Alex, J. Bellamy ‘Conflict Prevention and the Responsibility to Protect’ (2008) 14(2) *Global Governance* 135.

⁹ Bern, PRNewswire *Farewell to Neutrality and Human Rights Protection?* (February 25, 2014) <http://www.prnewswire.com/news-releases/farewell-to-neutrality-and-human-rights-protection-247029111.html> assessed 15 October 2014; Samantha Besson ‘Justifications’ in *International Human Rights Law* Oxford University Press 2014; Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law in Foreign Policy* Cambridge University Press 2014; Bruno Charbonneau, ‘The Imperial Legacy of International Peacebuilding: The case of Francophone Africa’ (2014) 40 *Review of International Studies* 607; Peter Certo ‘Military Intervention in Syria Is the Problem, Not the Solution’ November 18, 2015 *Foreign Policy in Focus* <http://otherwords.org/military-intervention-is-the-problem-not-the-solution/> accessed November 18, 2015; Aryn Baker ‘War and Rape’ April 18 2016 *Time* 36.

¹⁰ *The Danish Report* 1999; ICISS Report 2001, Bellamy 2006, 143; Bellamy 2009; Michael Ignatieff ‘State failure and nation-building’ *Humanitarian Intervention*:

an international legal rule exists, but then understand the rights or obligations of that rule in different ways - particularly when it involves the simultaneous application of laws on the use of force and human rights?

The thesis suggests that the underlying problem is not whether a rule of international law is legally binding but rather how states translate into practice a rule of international law that simultaneously claims the protection of human rights and permits the use of military force for that protection. As will be discussed in Chapter Seven, while the legitimacy or legality of an action may enter into the decision-making process of states, it is the contention here that states pursue actions that are determined by their interpretation of an international rule at the domestic level.¹¹ Since most claims in international law must be made by a state as established by the principle of state sovereignty,¹² which gives the

Ethical, Legal and Political Dilemmas. Cambridge University Press 2003; Katharina P. Coleman, *International Organisations and Peace Enforcement, The Politics of International Legitimacy* Cambridge University Press 2007; Stephen M. Walt, 'The Relationship Between Theory and Policy in International Relations' (2005) 8 *Annual Review of Political Science* 23.

¹¹ Chapter 7.b. discusses the distinction between legality and legitimacy of actions for humanitarian intervention which are generically criss-crossed by the interplay between law and policy. Hans J. Morgenthau 'To Intervene or Not to Intervene' (1967) 45 *Foreign Affairs* 425; Hans J. Morgenthau *Human Rights and Foreign Policy*, 1979vLecture and Symposium with Hans J. Morgenthau, The Carnegie Council Archives, www.cceia.org/resources/publications/ accessed 9 July 2015; Jean-François Revel *Democracy Against Itself* New York Free Press 1992; Jeremy Levitt 'The Law on Intervention: Africa's Pathbreaking Model' (Winter/Spring 2005) *Global Dialogue*; J.L. Holzgrefe and Robert O. Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* Cambridge University Press 2003; Jules Coleman, PhD., JD. *Moral Force of Legal Directives* Paper presented at the Hart-Fuller Conference, New York University 30 January 2008; Katharina P. Coleman *International Organisations and Peace Enforcement, The Politics of International Legitimacy* Cambridge University Press 2007; Jutta Brunnée and Stephen Toope *Legitimacy and Legality in International Law: An Interactional Account* Cambridge University Press 2010.

¹² The state is the primary actor in the international system. The concept of state sovereignty is one of the defining principles of international law under both the United

state the ultimate authority in the decision-making process, legalising moral standards for intervention at the international level in future decisions are inevitably limited.¹³ This is because a state's legal culture directly engages the legitimacy of human rights through its legal sources during the decision-making process and will define state perceptions of what is considered correct and valid for each individual legal institution.¹⁴

This is further complicated by the reality that international law, like all law, is open to multiple interpretations at both state and international levels during any decision-making process.¹⁵ Therefore any or all interpretations could be considered reasonable and valid. Thus, it is

Nations Charter and customary international law UN Charter, articles 2(1) (4) (7) reprinted in Malcolm D. Evans (ed) *Blackstone's International Law Documents 7th Edition* Oxford University Press 2006:9. The "basic international legal status of a state's ability to independently, without external interference, determine its internal and external policies ..." 'Sovereignty' *Encyclopædia Britannica, Inc.* 2014 <https://www.britannica.com/topic/sovereignty> accessed 15 January 2018. See also J.M. Kelly, *A Short History of Western Legal Theory* Oxford University Press 2000.

¹³ In the United States this is established in Article VI, Section 2, of the U.S. Constitution, the Supremacy Clause "provides that the Constitution, and the Laws of the United States ... must prevail over any conflicting or inconsistent state exercise of power" and as noted in the Preamble of the Constitution of the Fifth Republic 1958 of France (Journal Officiel de la République Française 5 October 1958 <https://www.legifrance.gouv.fr/Droit-francais/Constitution> accessed 29 October 2015).

¹⁴ Institutions are defined herein as the sets of rules and codes for governing that form policy and customs that produce foreign policy. As is discussed in Chapter Two, due to different legal systems found in different countries, the laws addressing international law will include both common law (case law in the United States) and civil law (statutes in France). Jack Donnelly, 'The Social Construction of International Human Rights' in *Human Rights in Global Politics* Cambridge University Press. 1999; Christian Reus-Smit, *The Politics of International Law* Cambridge University Press 2004; Gilbert Guillaume, 'Droit international et action diplomatique - Le cas de la France' (1991) 2 *European Journal of International Law* 1 136; Françoise Bouchet-Saulnier, *The Practical Guide to Humanitarian Law* Rowman & Littlefield Publishers 2001

¹⁵ 'General Principles of International Law' *International Judicial Monitor*, American Society of International Law and the International Judicial Academy; September 2006, Volume 1, Issue 4. See also Mary Ellen O'Connell 'The UN, NATO, and International Law after Kosovo' (2000) 22, no.1 *Human Rights Quarterly* 57, 89; Timothy Endicott, *Vagueness in Law* Oxford University Press 2000.

argued that the interpretation of international law, and its effectiveness at the domestic level, are both crucial to understanding the relationship between different legal regimes and the process of legal interpretation when considering how a state should legally respond to humanitarian concerns relating to regional conflict in the formulation of foreign policy. For purposes of this thesis, interpretation produces a justification mechanism for legal change, particularly when there is a need to integrate different legal norms and regulations within an existing legal framework.

With this in mind the focus of the research is on the comparative analysis of the United States and France's legal institutions, concerning their interaction with, and interpretation of international law, when deliberating foreign policy, using four civil conflicts as a case study of humanitarian intervention – the Liberian civil war (1989), Operation Restore Hope (1992 Somalia), Opération Turquoise (1994 Rwanda) and the conflict in Côte d'Ivoire (2002-present). The timeline presents varying responses of intervention to human rights abuses in Africa that proliferated following the end of the Cold War¹⁶ to the emergence of the Responsibility to Protect Doctrine ("R2P") which obligated states to

¹⁶ During the Cold War humanitarian intervention was based upon the ideological objectives between communism and capitalism. Michael Ignatieff 2003; Katharina P. Coleman 2007; Peter R. Baehr & Monique Castermans-Holleman *The Role of Human Rights in Foreign Policy* Third Edition Palgrave MacMillan 2004; Chris Abbott 'Humanitarian Intervention Rights and Responsibilities: The Dilemma of Humanitarian Intervention' 2005 7, No. 1-2 *Global Dialogue*; Donald Rothchild *Managing Ethnic Conflict in Africa* The Brookings Institution 1997; Thomas J. Callahan 'Some Observations on Somalia's Past and Future' March 1994 *CSIS Africa Notes* 158; Herman J. Cohen *Intervening in Africa: Superpower Peacemaking in a Troubled Continent* Palgrave Macmillan 2000; Kansteiner 2009. The literature is discussed more fully in Section Four, the empirical chapters.

protect their citizens.¹⁷ Each conflict relates directly to legal-political challenges and significant legal differences involved in the formation of foreign policy relating to human rights, which challenged decades of United States and French foreign policy in the African region.

The aim of the thesis is to generate a greater understanding of how decision-makers in the United States and France identify points of interaction between different legal regimes and the interpretive role of law during foreign policy formation. Specifically when there is a need to integrate different legal norms and policy within a state's existing legal framework. Because international law requires a state to carry out its international obligations,¹⁸ the state's domestic legal framework becomes the legitimating function which positions how the interpretative process is established between international principles and foreign policy during decision-making.¹⁹ Whilst state law will include the international legal

¹⁷ Gareth Evans and Mohamed Sahnoun (Co-Chairs) *The Responsibility to Protect* (December 2001) Report of the International Commission on Intervention and State Sovereignty. International Development Research Group ("ICISS Report 2001"). For a discussion on Africa and sovereign responsibility see: Kansteiner 2009; Alex J. Bellamy 'Whither the Responsibility to Protect? Humanitarian Intervention and the 2005 World Summit' (2006) 20(2) *Ethics & International Affairs* 143; Alex J. Bellamy 'Conflict Prevention and the Responsibility to Protect' (2008) 14(2) *Global Governance* 135; Francis M. Deng 'From 'Sovereignty as Responsibility' to the 'Responsibility to Protect'' (2010) 2 *Global Responsibility to Protect* 353, 370; Francis M Deng, Donald Rothchild and I. William Zartmann *Sovereignty as Responsibility: Conflict Management in Africa* Washington Brookings Institution 1996.

¹⁸ Peter Malanczuk *Akehurst's Modern Introduction to International Law* 7th Edition Routledge 1997; Malcolm N. Shaw *International Law* Fifth Edition Cambridge University Press 2008.

¹⁹ Christian Tomuschat argues that international law is dependent upon the state for legitimacy (Christian Tomuschat *International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law*, 1999 281 *Recueil des Cours* 10, 25. See also Michael Byers (ed.) *The Role of Law in International Politics* Oxford University Press 2000, Beyers examines the role that international law plays in international politics and state practice in the twenty-first century; Thomas Risse and Kathryn Sikkink 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Steve C. Ropp

principles and standards germane to the situation at issue, the applicable foreign policy, a function of domestic law, will be state specific. This will allow the thesis an analytical focus which centres more on what international law *does* on a particular issue in foreign policy and less on what international law *is*. In doing so, the research attempts to foster interdisciplinary dialogue between legal study and foreign policy analysis which currently remains fragmented and undermines issues concerning the protection of human rights during regional conflict.²⁰

To achieve this an interdisciplinary methodology is needed that can identify where humanitarian intervention and its interests interact with foreign policy formulation.²¹ The research therefore locates itself at the

and Kathryn Sikkink (eds.) *The Power of Human Rights* Cambridge University Press 1999; Grigori, I. Tunkin *The Influence of International Law on Foreign Policy* Harvard University Press 1984.

²⁰ Joel Westra argues on the few interdisciplinary connections between the study of international law and foreign policy decision-making, further work is necessary to develop these connections (Joel Westra 'International Law and Foreign Policy Decision-Making' *The Oxford Encyclopedia of Foreign Policy Analysis* Oxford University Press 2017. Ian Hurd challenges the assumptions about the separation of specialized fields in international relations in *Globalization and International Relations Theory* Oxford University Press 1999; Martha Nussbaum argues for an interdisciplinary approach and against various kinds of separations between disciplines (Martha Nussbaum, *Creating Capabilities: The Human Development Approach* Harvard University Press 2011; "basic problems appear to have impeded the development of an integrative understanding of international legal study and foreign policy," Benjamin A. Most & Harvey Starr, 'International Relations Theory, Foreign Policy Substitutability, and "Nice" Laws' (1984) 36(3) *World Politics* 383,384); Charlotte Ku maintains that continued fragmentation presents a barrier to research (Charlotte Ku, et al., 'Exploring International Law: Opportunities and Challenges for Political Science Research' (Spring 2001) 3, No. 1 *International Studies Review* 3).

²¹ It is this author belief that humanitarian intervention is an area of study that requires an interdisciplinary methodology because both law and policy are used in decision-making. As such, an interdisciplinary methodology draws from two or more disciplines to discover something new by thinking across boundaries or for further coherence on a discipline which cannot be adequately understood from a single perspective, see: Britt J. Holbrook, 'What is interdisciplinary communication? Reflections on the very idea of disciplinary integration' July 2013 11 *Synthese* 1865; Fred Grünfeld, 'International Law and International Relations: Norm and reality or viceversa' 2011 3, n. 3 *Amsterdam Law Forum*, [S.l.] 3; <http://amsterdamlawforum.org/article/view/233/411> accessed 19 September 2017.

intersection of two established fields, international legal study and foreign policy, using humanitarian intervention as the case study. Humanitarian intervention is used as a case study because it captures the tension in domestic foreign policy decisions between levels of intervention such as whether to use force, or whether not to intervene concerning the protection of human rights.²²

The methodology must also be able to analyse both the role and interpretive process of international law at the domestic level during policy-making and the underpinning rationale of the decision-makers. Consequently, the research combines comparative foreign policy analysis²³ and neoclassical realism in its innovative theoretical approach, with empirical research.²⁴ This approach is able to guide this research because it builds on comparative foreign policy's²⁵ premise of the

²² International law includes customary international law that develops through a process of state practice and actions *Black's Law Dictionary*, *West's Encyclopedia of American Law* The Gale Group, Inc. 2008 available from: Westlaw.com.; Malanczuk 1997.

²³ A subfield of international relations theory: Valerie Hudson, 'Foreign Policy Decision-Making: A Touchstone for International Relations Theory in the Twenty-First Century' (2002) *Foreign Policy Decision-Making (Revisited)* 1; Laura Neack, Jeanne Hey & Patrick Haney (eds.) *Foreign policy analysis* Prentice Hall 1995; James D. Fearon, 'Domestic Politics, Foreign Policy and Theories of International Relations' (1998) 1 *Annual Review of Political Science* 289. See chapters four and five of this thesis.

²⁴ There has been an "historical disconnect between FPA [foreign policy analysis] and "mainstream" IR [international relations] resulting in contemporary IR [international relations] theories that are considerably underdeveloped" Juliet Kaarbo 'A foreign policy analysis perspective on the domestic politics turn in IR theory' (2015) 17(2) *International Studies Review* 189, 215.

²⁵ James N. Rosenau 'Pre theories and theories of foreign policy in R. B. Farrell (ed.), *Approaches to Comparative and International Politics* Northwestern University Press 1966, 115; James N. Rosenau 'The External Environment as a Variable in Foreign Policy Analysis' *The Scientific Study of Foreign Policy* Nichols Publishing 1980. [Comparative] foreign policy analysis links the way states relate to each other in international politics to the study of domestic politics Jeffrey S. Lantis & Ryan Beasley 'Comparative Foreign Policy Analysis' *Oxford Research Encyclopedia: World Politics* Oxford University Press 2017:4. See also Valerie M. Hudson 'Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations' (March 2005) 1,

necessity of analysing an occurrence in terms of independent, intervening and dependent variables which is compatible with the basic theoretical structure from neoclassical realism.²⁶ The fundamental tenets of neoclassical realism are that foreign policy is an outcome of both international structure and domestic factors, as well as of a complex interaction between the two.²⁷ With this methodology in place it is argued that in allocating space to the interpretative process though the state's unit-level variables, neoclassical realism identifies the way a state manages systemic information (humanitarian concerns) and how systemic information influences the state's ability to interpret societal demands and respond to them effectively. This can therefore explain how similarly structured states respond in different ways to similar international concerns of peace and security.²⁸ Accordingly, a legal-theoretical framework is created that focuses on how humanitarian pressures are translated through a state's legal structure and its decision-makers which ultimately affects the course of action a state may be willing to take in humanitarian intervention decisions.

Issue 1 *Foreign Policy Analysis* 1; Steven Smith 'Foreign Policy Analysis and International Relations' (1987) 16(2) *Millennium: Journal of International Studies* 345.

²⁶ Gideon Rose 'Neoclassical Realism and Theories of Foreign Policy' (October 1998) 51 *World Politics* 1. "A policy paradigm is internalised by decision-makers and policy experts, and acts as a source of guidance for conducting and evaluating policies, which defines the range of legitimate methods available in the international system (Colin Hay *Political Analysis* Palgrave 2002:197). Randall L. Schweller discusses neoclassical realism and this policy paradigm in 'The Progressiveness of Neoclassical Realism' in Colin Elman and Miriam Fendius Elman (eds) *Progress in International Relations Theory: Appraising the Field* Belfer Center for Science and International Affairs 2003; John F. Clark 'Realism, Neo-Realism and Africa's International Relations in the Post Cold War Era' in Kevin C. Dunn and Timothy M. Shaw (eds) *Africa's Challenge to International Relations Theory* Palgrave 2001.

²⁷ Ibid.

²⁸ Charter of the United Nations, Articles 2(4), 42 and 51 in Evans 2006:9, 42, 51.

The decision to employ this theoretical approach is motivated by two observations. First, analysis is generally represented as a failure of the international system to solve problems of compliance with international law or of the refining of accepted norms and standards,²⁹ instead of investigating the ways in which foreign policy decisions concerning international rules are legitimated and constructed for authorization within the domestic legal framework. This is puzzling since, as this thesis argues, humanitarian intervention or non-intervention and the decision to use force are fundamentally domestic legal-political decisions determined by state law. If one considers that law (domestic and international in the context of this thesis) is dealt with through the state's legal institutions (the way law is created and sources of law), examining the role of domestic law in the state's decision-making process provides the framework through which decision-makers interpret international law and human rights.³⁰

²⁹ In 'The Responsibility to Protect-Five Years On', Alex Bellamy discusses the failure of the United Nations Security Council and other international organisations to fulfill its obligation of norm expansion with regard to the Responsibility to Protect (Alex Bellamy (2010) 24(2) *Ethics & International Affairs* 143. Criticisms are numerous, for example: Secretary-General Ban Kimoon's Report entitled *Implementing the Responsibility to Protect* developed with Special Advisors Francis Deng and Edward C. Luck (UN document A/63/677 January 2009); *Early Warning, Assessment, and the Responsibility to Protect* (UN document A/64/864) 14 July 2010; Martha Finnemore and Kathryn Sikkink 'International norm dynamics and political change' (Autumn 1998) 52, No. 4 *International Organization* 887:888, 891; Ramesh Thakur 2009; Rainer Forst 'The Justification of Human Rights and the Basic Right to Justification: A Reflexive Approach' (July 2010) 20, No. 4 *Ethics* 711:712; Samantha Beeson 'Justifications' in Moeckli, Daniel, Sangeeta Shah & Sandesh Sivakumaran *International Human Rights Law* Oxford University Press 2014.

³⁰ Jack Donnelly 'The Social Construction of International Human Rights' in Tim Dunne and Nicholas J. Wheeler (eds) *Human Rights in Global Politics* Cambridge University Press 1999; Christian Reus-Smit 2004; Guillaume 1991:136; Michael P. Scharf and Paul R. Williams *Shaping Foreign Policy in Times of Crisis: The Role of International Law and the State Department Legal Advisor* Cambridge University Press 2010; Françoise Bouchet-Saulnier *The Practical Guide to Humanitarian Law* Rowman & Littlefield Publishers 2001.

To examine this, France and the United States have been selected for this comparative analysis because whilst they both have long standing relations with Africa,³¹ they also have two very distinct legal systems. This makes them particularly suitable for this discussion because domestic legal-political processes affect the ability of the state to act in international politics.³² Structurally both states are democracies with constitutional legal systems despite this the differences between the two states' legal institutions and the sources are pronounced.³³ By comparing how the legal systems of France and the United States function, the research is able to consider the conceptual differences and approaches encountered when interpreting international law within different legal regimes. Although human rights are part of foreign policy for both countries, each state's legal structure and its perception of a security situation will ultimately determine the course of the state's foreign policy; even when facing the same international pressures.³⁴

Second, since policymakers must make decisions in specific cases based on what is happening and what they expect will continue to happen,³⁵ the process and mechanisms by which international law becomes applicable

³¹ Section Four discusses both France's and the United States' relationship to Africa.

³² The Legal Systems of France and the United States are discussed in Section One, Chapter 2.

³³ Footnote 23.

³⁴ Scharf and Williams 2010; Bouchet-Saulnier 2001; Friedrich Kratochwil *The Status of Law in World Society: Meditations on the Role and Rule of Law in Foreign Policy* Cambridge University Press 2014.

³⁵ Christopher Hill *The Changing Politics of Foreign Policy* Palgrave MacMillan 2003; Juliet Kaarbo, Lantis, Jonathan S., & Beasley, Ryan 'The Analysis of Contemporary Comparative Foreign Policies' in Beasley, Kaarbo, Lantis, & Snarr (Eds.) *Contemporary Comparative Foreign Policy* CQ Press 2002:1-23; Lantis and Beasley 2017.

in foreign policy needs to be more clearly identified to create a greater understanding of each state's interpretive process. Neoclassical realism³⁶ is introduced to *unpick* the relationship between international law and foreign policy.³⁷ It is used because analysing the formation of foreign policy with state strategies and international law requires a theory that fulfils different requirements. It must integrate humanitarian concerns, specifically the use of force and human rights (systemic pressures/independent variables) with the domestic structures or legal institutions (unit level/intervening variables) to establish foreign policy (dependent variable).³⁸ This specific underlying mechanism, which positions the domestic legal decision-making environment between the international system and foreign policy, constitutes how decision-makers interpret and understand the role and purpose of law and how this regulates foreign policy decisions.³⁹ In that state law will mediate the tension between the rules of international law and foreign policy and as

³⁶ Rose 1998.

³⁷ Critique towards neoclassical realism typically comes from within the school of Realism itself. For instance see Adam Quinn 'Kenneth Waltz, Adam Smith and the Limits of Science; or 'Hard choices for neoclassical realism' (2013) 50 Issue 2 *International Politics* 159. 'Randall Schweller also offers an interesting position in 'A Tale of Two Realisms: Expanding the Institutions Debate' (April 1997) 41 in *Mershon International Studies Review* 2.

³⁸ Neo-classical realism suggests that "the impact of power capabilities on foreign policy is indirect and complex, because systemic pressures must be translated through intervening unit-level variables such as decision-makers' perceptions and state structures" (Steven E. Lobell, Ripsman, Norrin M., and Taliaferro, Jeffrey W. *Neoclassical Realism, The State, and Foreign Policy* Cambridge University Press 2009, 7). See also: Gideon Rose 'Neoclassical Realism and Theories of Foreign Policy' (October 1998) 51, No. 1 *World Politics* 144; Lobell, Ripsman and Taliaferro 2009:97; Jeffrey W. Taliaferro 'State Building for Future Wars: Neoclassical Realism and the Resource-Extractive State' (July–September 2006) 15 no. 3 *Security Studies* 464; Fareed Zakaria *From Wealth to Power* Princeton University Press 1997.

³⁹ "Foreign policy decision-making takes place in an increasingly legalized environment" (Westra 2017:1).

such will fuse with international law to effect policy within an individual state. Something other theoretical approaches are unable to do.⁴⁰

As will be discussed in Chapter Five, for the realist the international system is defined the absence of a central authority (anarchy).⁴¹ “In such an anarchic system, State power is the key—indeed, the only—variable of interest.”⁴² The “overriding emphasis on anarchy and power leads them [realists] to a dim view of international law and international institutions. International law is thus a symptom of State behaviour, not a cause.”⁴³ Liberalism is “challenging because international law has few mechanisms for taking the nature of domestic preferences.”⁴⁴ Liberal theories would also ignore significant legal differences between states and situations given its focus on cooperation between states.⁴⁵ The English School emphasises the centrality of international society to the study of international politics. It maintains the international system functions in the absence of a central authority and questions the state-

⁴⁰ Chapter Five, the Schools of International Relations Theory, critiques the literature of four mainstream theories of international relations that the thesis considers dominate the foreign policies of France and the United States: realism, liberalism, English School and constructivism. The chapter establishes why other international relations theories are unable to provide a viable enforcement mechanism to assist systemic information through foreign policy.

⁴¹ “Anarchy is the term used in international relations to describe a social system that lacks legitimated institutions of authority” (Helen Milner ‘The assumption of anarchy in international relations theory: a critique’ (1991) 17 *Review of International Studies* 67; Kenneth N Waltz *Theory of International Politics* McGraw Hill 1979).

⁴² Anne-Marie Slaughter ‘International Relations, Principal Theories’ in E. Wolfrum (editor) *Max Plank Encyclopedia of Public International Law* Oxford University Press 2011:2; M. Beavis *The IR Theory Homepage* 2017 <http://www.irththeory.com/> accessed 1 August 2017.

⁴³ John Mearsheimer ‘The False Promise of International Institutions’ (1994) 19(3) *International Security* 5 32.

⁴⁴ Slaughter 2011:14; Beavis 2017.

⁴⁵ Andrew Moravcsik ‘Taking Preferences Seriously: A Liberal Theory of International Politics’ (1997) 51 *International Organisations* 513; Robert O. Keohane and Joseph S. Nye *Power and Interdependence: World Politics in Transition* Little Brown 1997.

centric framing in international relations.⁴⁶ Thus the English School's authority is established from the systemic level with little insight given to the domestic level of analysis.⁴⁷ Moreover "it does not seek to create testable hypotheses about State behaviour as the other theories do."⁴⁸ "Constructivists argue that the norm of state sovereignty has profoundly influenced international relations, creating a predisposition for non-interference that precedes any cost-benefit analysis states may undertake based on constructed attitudes rather than the rational pursuit of objective interests."⁴⁹ Constructivist's, like Wendt, further argue that anarchy is a construct of the state in the international system.⁵⁰ Waltz opposes this, he argues the conception of international relations as lacking authority. Since there is no duly constituted legal authority above the state, there can be no authority between states.⁵¹ "The commitment to systemic theorizing leads him [Wendt] to incorrectly assume states act in a unified

⁴⁶ Hedley Bull *The Anarchical Society: A Study of Order in World Politics* Macmillan London 1977.

⁴⁷ Tim Dunne *Inventing International Society: A History of the English School* St Martin's Press 1998; Tim Dunne and Nicholas Wheeler 'Hedley Bull's Pluralism of the Intellect and Solidarism of the Will' (1996) 72 *International Affairs* 91; Andrew Linklater *The English School of International Relations: A Contemporary Reassessment*. Cambridge University Press 2006.

⁴⁸ Chris Brown and Kirsten Ainley *Understanding International Relations* Palgrave Macmillan 2009:11; Chris Brown 'The development of international relations theory in the United Kingdom: traditions, contemporary perspectives and trajectories' 2009 46 (1-2) *International Studies* 221; Barry Buzan *From International to World Society: English School Theory and the Social Structure of Globalization* Cambridge University Press 2004.

⁴⁹ Slaughter 2011:22.

⁵⁰ Alexander Wendt 'Anarchy is what States Make of It: the Social Construction of Power Politics' (Spring 1992) 46, no. 2 *International Organization* 391; and Alexander Wendt 'Constructing International Politics' (1995) 20(1) *International Security* 71.

⁵¹ Kenneth Waltz 1979. Waltz is a founder of the neorealist school of thought, Ole Waever 'Waltz's Theory of Theory' (2009) 23 (2) *International Relations* 201.

way;⁵² whilst Hidemi Suganami critiques constructivism's 'complex philosophical argumentation',⁵³ to which this author agrees.

By undertaking this approach in neoclassical realism, the interaction between international law, state law and foreign policy is analysed from the domestic legal perspective, not the systemic level of law. This adds value to the current literature at both a theoretical and an empirical level, since research has been biased toward processes at the international system level.⁵⁴

Consequently, when interpreting international law through the domestic legal framework, a state theoretically provides an enforcement mechanism for international authority at the state level. In that the domestic legal framework will identify the legal scope and/or limitations when establishing international principles for humanitarian concerns within foreign policy. Given this, the thesis posits that if international law is legally and politically constructed within a state's foreign policy, via the intervening variables operative at that level, international law attains political authority through the domestic process. This then challenges the traditional constructivist understanding of anarchy in

⁵² Pauline Rouillon *Questioning Alexander Wendt's critique of IR theory* London School of Economics Publishing 2016.

⁵³ Hidemi Suganami 'On Wendt's philosophy: a critique' (2002) 28 *Review of International Studies* 2002:23, 25.

⁵⁴ The literature is extensive but for instance see, footnote 40 of this thesis; Jeremy Moses 'Sovereignty as irresponsibility? A Realist critique of the Responsibility to Protect' (2013) 39 *Review of International Studies* 113; Edward Luck *Limitations and Responsibilities: Prof. Edward Luck Discusses R2P* (9 November 2011) Parliamentarians Network for Conflict Prevention <http://www.parliamentariansforconflictprevention.net/meeting/limitations-and-responsibilities-prof-edward-luck-discusses-r2p> accessed 15 July 2016; Alex J. Bellamy, 'The Responsibility to Protect—Five Years On' (2010) 24(2) *Ethics & International Affairs* 143.

international relations,⁵⁵ which argues that unlike domestic situations there is an absence of a central government to enforce international law, even if, *anarchy is what states make of it*.⁵⁶

In its application of neoclassical realism, the research considers a variation in the traditional meaning of power and rule structures inherent in realist theory,⁵⁷ which has traditionally measured power in terms of military capabilities or economic strength.⁵⁸ In rejecting any obscure versions of law as resting on ideational factors, the research stresses that law, as a state's internal resource, is important in the domestic decision-making environment because legal institutions exert power and as a result domestic legal institutions shape foreign policy and may exert power in the international environment. The originality behind this approach is that it recognises that state power is not limited to its material factors such as its external military or economic recourses, but also draws upon its internal resources, such as sources of law (which re-enforce a state's normative power structures) and the strategic capabilities involved in the interpretation, application and execution of the rules of international law.

⁵⁵ Wendt 1995; Slaughter 2011, amongst others.

⁵⁶ Constructivism argues that anarchy is a construct of the state in the international system Wendt 1992. Wendt repeats this discussion in Alexander Wendt *Social Theory of International Politics* Cambridge University Press 1999.

⁵⁷ Evidence of power and rule structures were apparent in the Cold War, wherein the United States and Soviet Union sought allies for protection and to increase their political and military influence abroad. John F. Clark 'Realism, Neo-Realism and Africa's International Relations in the Post Cold War Era in *Africa's Challenge to International Relations Theory* Kevin C. Dunn and Timothy M. Shaw (eds) Palgrave 2001; Brown and Ainley 2009; Slaughter 2011.

⁵⁸ Ibid., also Kenneth Waltz *Realism and International Politics* Routledge Publishers 2008; Robert Jervis 'Realism in the Study of World Politics' (Autumn 1998) 52, 4 *International Organization* 52, 971; Stephen M. Walt 'The Progressive Power of Realism' (1997) 91, no 4 *American Political Science Review* 933.

In utilising the interdisciplinary framework as outlined above, the thesis seeks to provide answers to these three inter-related research questions:

- Do states interpret international law differently to support their foreign policy decisions to use force or not intervene for humanitarian reasons?
- How do we understand the sources and process of the strategic use of interpretation and legal reasoning for policy purposes, particularly since decision-makers tend to interpret potential security threats differently?
- If international law is politically constructed within a state's foreign policy through unit-level/intervening variables does international law attain political authority?

These questions are important to answer on several levels. First the comparative findings provide a deeper understanding of the domestic legal process and mechanisms by which international law regulates the interaction between the state and its position in the international system. Second, critical analysis illustrates how essential differences in the interpretation and application of international law at the domestic level, through a state's legal-political framework, affect how states shape the structure of authority and legitimacy in their foreign policy around humanitarian concerns. This is particularly useful when considering that the globalization of rules and procedures, at both the international and domestic level, will affect the scope of legal interpretation which may be considered unprecedented given the ongoing debate on human rights protection. Third, given that there have been few interdisciplinary connections between international legal study and foreign policy

analysis,⁵⁹ the findings from this thesis make it necessary to consider the existing analytical framework for addressing inherent problems in the international system which arise in the continuation of separate specialised fields of study, particularly if adequate international responses are to be achieved.

To answer the research questions this thesis has four distinct sections. Section One is comprised of three chapters and presents the legal framework for the basis of the study of humanitarian intervention in post-Cold War French and United States' foreign policy. To establish the importance of interpretation, the Section begins by reviewing the literature on two legal approaches - interpretivist⁶⁰ and positive law,⁶¹ before critiquing Ronald Dworkin's views on the interpretative nature of law and the role of legal sources⁶² together with a critique of Christian Tomuschat's assertions on international law's dependent characteristics, to support the thesis' position.⁶³ Both communicate legal obligations about how authority is constituted and maintained. Dworkin argues

⁵⁹ Westra 2017; Dickovick and Eastwood 2015; David Forsythe *The Politics of International Law: U.S. Foreign Policy Reconsidered* Lynne Rienner Publishers, Inc. 1990; Most and Starr 1984.

⁶⁰ Nicos Stavropoulos 'On Interpretivist Law' (2013) *Stanford Encyclopedia*: <https://plato.stanford.edu/entries/law-interpretivist/> accessed 13 October 2016; Joseph Raz 'Why Interpret' (1996) *Ratio Juris*, 9: 349–63; Julie Dickson, 'Interpretation and Coherence in Legal Reasoning' (2010) *Stanford Encyclopedia of Philosophy* <http://www.seop.leeds.ac.uk>; Louis Fisher *Constitutional Dialogues: Interpretation as Political Process* Princeton University Press 1988.

⁶¹ Black's Law Dictionary 2008; H.L.A Hart *The Concept of Law*, 2nd edition, edited by Penelope Bulloch and Joseph Raz Clarendon Press 1994 (first edition 1961); Jules L. Coleman 'Negative and Positive Positivism' (1983) (1983) 11 *Journal of Legal Studies* 139.

⁶² Ronald Dworkin 'Is There Truth in Interpretation? Law, Literature and History' 2009; Ronald Dworkin 'A New Philosophy for International Law' (2013) 41 *Philosophy & Public Affairs* 2.

⁶³ Christian Tomuschat 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century, General Course on Public International Law' (1999) in 281 *Recueil des Cours* 10, 25.

because law is interpretive it must provide relevance that coheres with a state's legal system,⁶⁴ whilst Tomuschat advocates that international law credentials rest on a state's democratic process.⁶⁵ Next the question of how legal behaviour shapes policy towards international law will be explained with the legal systems of France and the United States in Chapter Two to illustrate the arguments made. This is followed by Chapter Three, which discusses the necessity of interdisciplinary work, in establishing the relationship between legal study and foreign policy, along with barriers to research.⁶⁶ This chapter concludes with a legal framework consisting of neoclassical realism to illustrate how a theory of international relations functions in both domestic and international legal study for this research.⁶⁷

To elucidate the methodology that underpins this research, Section Two presents the components of the theoretical framework. Chapter Four begins by identifying the rationale for the use of comparative foreign policy analysis, which will allow the thesis to explain the various differentials that led the United States and France to adopt specific positions and approaches on intervention as official policy. To assert the position that neoclassical realism is the theoretical concept most applicable to this thesis, Chapter Five briefly reviews and critiques the literature of four mainstream theories of international relations that it

⁶⁴ Dworkin 1986:190.

⁶⁵ Tomuschat 1999:25.

⁶⁶ For example Francis Boyle has argued that the retention of a "power-law dichotomy has effectively blocked moves towards a more sophisticated conceptualization of the significance of the interpretation of international law to international politics" (Francis A. Boyle *World Politics and International Law* Duke University Press 1989 198).

⁶⁷ Rose 1998; Lobell, Ripsman and Taliaferro 2009.

considers to be dominant in the foreign policies of France and the United States: realism, liberalism, English School and constructivism.⁶⁸ It will be argued that these theories do not provide a viable enforcement mechanism to assist systemic information through foreign policy given that authority is situated at the systemic level of analysis. Additional consideration is given to constructivism in view of its traditional understanding of anarchy in international relations, which this thesis seeks to challenge⁶⁹ because constructivism does not account for unit level factors in foreign policy decisions in the same way neoclassical realism does.

Together these two chapters and the legal framework presented in Section One create an explicit legal-theoretical framework that focuses on the role of legal interpretation at both the state and international levels when formulating policy. Such a framework will prove germane when theorising the relationship between the rules of international law and foreign policy analysis since “foreign policy is guided by theoretical ideas”⁷⁰ and both share an interdependency with international politics.⁷¹

⁶⁸ Slaughter 2011:3-15.

⁶⁹ Wendt 1992. Adriana Sinclair *International Relations Theory and International Law: A Critical Approach* Cambridge University Press 2010:1; Onuf, Nicholas *World of Our Making: Rules and Rule in Social Theory and International Relations* Rutledge Publications 1989, reissued 2013; Friedrich Kratochwil ‘Constructing a New Orthodoxy? Wendt’s ‘Social Theory of International Politics’ and the Constructivist Challenge’ (2000) 29, no. 1 *Millennium* 73; Anne-Marie Slaughter, Andre S. Tulumello, Stepan Wood ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 *American Journal of International Law* 367; Slaughter 2011; Patrick Jackson *The Conduct of Inquiry in International Relations: The Philosophy of Science and its Implications for the Study of World Politics* Routledge 2011.

⁷⁰ Walt 2005:23.

⁷¹ [Comparative] foreign policy analysis links the way states relate to each other in international politics to the study of domestic politics. Lantis and Beasley 2017:4;

Lastly, Chapter Six outlines the methodology, the specifics of the research and further determines the formulation of the hypotheses that this research will test in the form of comparative studies between France and the United States.

To advance the legal and theoretical positions outlined in Sections One and Two, Section Three links their relevance to the development of humanitarian intervention. Chapter seven considers the development of the principles underpinning intervention. In line with this historical analytical objective, this chapter also covers the distinction between legitimacy and legality of actions and makes use of the 1999 NATO intervention in Kosovo and the recent crisis in Syria as examples of the ongoing legal-political dilemma over humanitarian intervention.

Section Four presents the empirical part of the thesis – the case study of humanitarian intervention in the four African conflicts. In applying neoclassical realism, the chapters illustrate how the United States and France responded to each humanitarian crisis as they constructed the case to intervene or not to intervene. In demonstrating this, the research draws attention to how limitations inherent to any state's legal institution cause the state's conduct to differ from the expectations of the international system. Chapter Eight analyses the United States' foreign

Valerie M. Hudson *Foreign Policy Analysis: Classic and Contemporary Theory* Rowman & Littlefield Publishers, Inc. 2007; Richard C. Snyder, H.W. Bruck and Burton Sapin 'Foreign policy decision making revisited' Palgrave 2002; Steven Smith 'Foreign Policy Analysis and International Relations' (1987) 16(2) *Millennium: Journal of International Studies* 345; Laura Neack, Jeanne Hey and Patrick Haney (eds.) *Foreign policy analysis* Prentice Hall 1995; Louis Henkin *How Nations Behave*, 2nd edition Columbia University Press 1979; Fearon 1998; amongst others.

policy decisions concerning the Liberian civil war (1989) and Chapter Nine is an analysis of Operation Restore Hope (1992, Somalia) while Chapter Ten analyses the foreign policy decisions of France in Opération Turquoise (1994, Rwanda) and the ongoing conflict in Côte d'Ivoire (2002, present) are considered in Chapter Eleven. There are many elements involved in decision-making.⁷² The empirical section identifies three causal factors which are proposed to make the argument that affect the principles of international law on the policy process of each conflict: 1) the decision-makers' arguments for foreign policy reasoning; 2) the domestic legal framework, which includes legal tradition and sources of law; and 3) the actions of the United Nations.

After the presentation of the case studies, Chapter Twelve reflects on the implications of the analysis in the preceding four chapters by comparing the factors that are proposed as affecting foreign policy in the United States and France to evaluate the variances between each state's decision-makers in light of the empirical evidence provided. The comparative analysis will reinforce the thesis' position that essential differences in a state's legal framework, its sources of law and strategic use of interpretation, affect how each state shapes the structure of authority and legitimacy in its foreign policy.

Finally, the concluding chapter draws together the key themes of the thesis and reflects on the research by returning to the research questions

⁷² Rosenau 1977; Lantis and Beasley 2017.

and the claims set out in the arguments and addresses the study's findings. It then considers the application of the theoretical framework and the possibilities that exist for further research.

In summary, although written within the framework of twentieth century thought on legal study and human rights many aspects of humanitarian intervention currently remain litigious. The author found that the four cases in this study of humanitarian intervention illustrate not only that differences in legal interpretation exist, but that the conceptualisation of international law at the state's domestic level is crucial to understanding a state's legal behaviour concerning humanitarian intervention. By employing comparative foreign policy and neoclassical realism in its theoretical approach, the research was able to focus on the domestic decision-making environment, of France and United States, between the international system and foreign policy, and then analyse how humanitarian pressures were translated through each state's legal structures and its decision-makers. This theoretical application illustrates that state power is not limited to military or economic recourses, but also draws upon internal resources, such as sources of law (which re-enforce a state's normative power structures) and the strategic capabilities involved in the interpretation, application and execution of the rules of international law. In this way the state, by utilizing its domestic legal and political structures as a mechanism for constructing international authority, allows for structures of hierarchy absent in the international system. This approach therefore considers a variation in the traditional

meaning of power and rule structures inherent in realist theory, which has traditionally measured power in terms of military capabilities or economic strength. It considers that the allocation of power can also be witnessed in a state's legal framework, which in turn questions the constructivist theory of 'anarchy is what states make of it'.⁷³

⁷³ Wendt 1992.

Section One:
Why Interpretation Matters and
the Legal Framework

“Through interpretation, the uncertain and unpredictable legal rule becomes more certain and more predictable.”

Raz, Joseph, 1996:28

I. The Legal Framework

This thesis examines the role of international law in the domestic decision-making process as it relates to humanitarian concerns between 1989 and 2002. Although written within the framework of twentieth century thought, the thesis deals with issues which have a wider relevance for humanitarian concerns today. Given that the legality of humanitarian intervention is as unclear now as it was in the late twentieth century, it is necessary to identify the domestic structures that underpin how international law determines the course of a state's foreign policy.⁷⁴ Thus it identifies how state decision-makers relate their foreign policy to principles of international law through the process of interpretation at the domestic level of analysis; and how the process of interpretation reflects the normative legal and political systems of the two countries under study: France and the United States. The implication of which may prove significant concerning differing issues of authority and the legality of enforcement for foreign policy decisions about human rights and the protection of those rights.⁷⁵

To the extent that the thesis discusses issues of interpretation through sources of law and precedent, it is a legal study of the interaction

⁷⁴ The legality of humanitarian intervention is one of the most controversial issues in international law (Ibid at footnote 17). Yvonne Lodico 'The Justification for Humanitarian Intervention: Will the Continent Matter?' *International Lawyer* 3 (2001) 1027; Allen Buchanan 'Reforming the Law of Humanitarian Intervention' in *Humanitarian Intervention: Ethical, Legal, and Political Dilemmas* Edited by J.L. Holzgrefe and Robert O. Keohane Cambridge University Press 2003; Robert L. Phillips and Duane L. Cady *Humanitarian Intervention: Just War vs. Pacifism* Rowman & Littlefield Publishers, Inc. 1996.

⁷⁵ Joseph Raz *Between Authority and Interpretation: On the Theory of Law and Practical Reason* Oxford University Press 2009.

between domestic law and international law⁷⁶ Where it analyses the legal aspects of the decision-making process and foreign policy it is a legal study of comparative foreign policy analysis. The research attempts to obtain an understanding of the legal reasoning and justifications behind the enforcement and effect of prescribed laws which initiate authority in foreign policy. In locating itself between the fields of international legal study and comparative foreign policy analysis the thesis takes an interdisciplinary approach to explain how law is used by decision-makers in the formation of foreign policy. This approach can prove empirical and conceptual links, as well as difficulties, which may otherwise become lost in separate specialized fields of study.⁷⁷

This problem, the gap between theoretical and empirical research in legal study and foreign policy analysis, is reflected in most debates on this subject.⁷⁸ Debates which tend to read either toward those who focus on the study of international law or toward those who focus on foreign

⁷⁶ Raz 2009; Slaughter, Tulumello and Wood 1998:367; Shirley V. Scott 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics' (1994) 5 *European Journal of International Law* 313; Nicholas Onuf *World of Our Making: Rules and Rule in Social Theory and International Relations* Rutledge Publications 1989, reissued 2013; Joseph Raz *The Concept of a Legal System: An Introduction to the Theory of Legal Systems* Oxford University Press 1970. Duncan Snidal argues however that now is time to reverse research studies and ask what international law can contribute to international relations (Duncan Snidal 'Law, Legalization and Politics: An Agenda for the Next Generation of IR-IL Scholars' (with Kenneth Abbott) in Jeffrey L. Dunoff and Mark A. Pollack and (eds.) *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* Cambridge University Press 2013:33).

⁷⁷ Katharina P. Coleman, *International Organisations and Peace Enforcement, The Politics of International Legitimacy* Cambridge University Press 2007:22; Ian Hurd *Globalization and International Relations Theory* Oxford University Press 1999:388; Slaughter, et al. 1998:367, 397; Bruno Simma and Andreas L. Paulus *Symposium on method in International Law: The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View* (1999) 93 *American Journal of International Law* 302; Dickson 2010.

⁷⁸ Westra 2017; Dickovick, et al. 2015; Ian Hurd 1999; Most and Starr 1984; Ku 2011; Forsythe 1990.

policy.⁷⁹ It is evident in traditional issues and ambiguities relating to the effectiveness of the rules of international law, as well as in debates centring on questions of legality and legitimacy around the protection of human rights and the use of force for that protection.⁸⁰ Noortmann has concluded that the concept of international law itself has become problematic, which may indicate that the traditional divisions of study, which provide the boundaries for research, may no longer be appropriate.⁸¹ Producing interdisciplinary work allows the research to focus on the effectiveness of international law in shaping authority and legitimacy within the state's domestic decision-making process and the policy dimensions associated with the application and enforcement of state law.

⁷⁹ Footnote 76; also see for instance Most and Starr 1984.

⁸⁰ Simon Chesterman 'Legality Versus Legitimacy: Humanitarian Intervention, the Security Council, and the Rule of Law' (2002) 33 No. 3 *Security Dialogue* 293-307. "The so-called black box is difficult for legal scholars and social scientists to penetrate to the degree necessary for sound analysis." (Michael Scharf 2010:xx). A key dispute concerns the effectiveness of international law in foreign policy. The realist approach argues that international law has no real power and it is not considered binding because there is no international police force to enforce the law. Liberalism disputes the realist thought of international law. They argue that breaking international law brings about consequences and that international organizations have a measurable impact on global relations (Slaughter 2011:3-15); Grünfeld 2011; Brown and Ainley 2009. Constructivist scholars reject both assumptions. "Constructivist focus on the building of social norms through interaction, and on the pathways through which they come to influence actors. Claiming that identity formation is relational and occurs before, or at least concurrently with, interest formation" (Brunnée & Toope 2012:27); Martin Griffiths, (ed.) *Encyclopaedia of International Relations and Global Politics* Routledge 2007; Adriana Sinclair, *International Relations Theory and International Law: A Critical Approach* Cambridge University Press 2010; Friedrich Kratochwil *The Status of Law in World Society: Meditations on the Role and Rule of Law in Foreign Policy* Cambridge University Press 2014.

⁸¹ Math Noortmann 'International Law and International Relations: Lost in Translation?' (October 2012) 2 Issue 1 *International Studies Today* 6. Martha Nussbaum argues for an interdisciplinary approach and against various kinds of separations between disciplines, including separation between theory and practice (Nussbaum 2011).

As a result, this thesis will achieve an understanding of how a rule of international law is legally interpreted and applied within a state's domestic legal context utilizing neoclassical realism, so that new perspectives are developed to help inform and develop an understanding of how state and international law interact simultaneously in foreign policy to effect humanitarian concerns.⁸²

The value of this undertaking is that by focusing on the importance of legal interpretation and its ability to justify or affect legal change, the research identifies points of interaction between different legal regimes and the interpretive role of law during foreign policy formation. Interaction at several stages of decision-making is essential when there is a need to integrate different legal norms related to the contestation over the protection of human rights during regional conflict.⁸³

Since the concept of interpretation is central to the argument of this thesis, this section begins with an analysis of the importance of interpretivist law (interpretation) and the limitations associated with positivist law. Whilst the author recognises that international legal theory includes various theoretical and methodological approaches to

⁸² “Rather than assuming that there need be a single law that accounts for a given phenomenon whenever and wherever it has occurred or will occur, it may be more productive to think of several laws, each of which is always true under certain conditions (or within certain domains), but which is only sometimes true empirically because those conditions do not always hold in the empirical world” (Most & Starr 1984:402).

⁸³ Richard C. Snyder, H.W. Bruck and Burton Sapin ‘The Decision-Making Approach to International Politics’ in James Rosenau (ed.) *International Politics and Foreign Policy*, rev. ed. Free Press 1969; Rosenau 1966; Westra 2017.

explain and analyse the subject of public international law,⁸⁴ interpretivist and positivist law have been selected to illustrate the thesis' position given their opposite points of view to the application of law.⁸⁵ How legal behaviour shapes policy towards international law follows on from this analysis and the legal systems of France and the United States are discussed in Chapter Two to provide illustration for this critique. This is followed by Chapter Three, which considers the necessity of interdisciplinary work, in establishing the relationship between international law, domestic law, foreign policy, and the implications of the relationship. This section discusses the reasons why this relationship needs to be examined in greater detail, along with the barriers to research, and concludes with a legal framework consisting of neoclassical realism.

1. Why Interpretation Matters

The concept of interpretation is key to the argument of this thesis, and as such is discussed throughout the thesis by either direct reference or analytical inference.⁸⁶ Interpretation, in the context of this thesis, is a legal mechanism that allows the rules of international law to be adapted to unforeseen situations, such as humanitarian intervention. The interpretation of which lies between the identification of existing

⁸⁴ See for instance: Slaughter, Tulumello and Wood 1998; Scott 1994; Onuf 1989; Raz 1970.

⁸⁵ William Neuman *Social Science Research Methods: Qualitative and Quantitative Approaches* (4th Ed.) Allyn and Bacon 2000; Ole Holsti, Robert C. North and Richard A. Brody 'International Relations as a Social Science: A Research Approach' (1966) *International Social Science Journal*, vol. XVII.

⁸⁶ Interpretivism is a school of thought in contemporary jurisprudence and the philosophy of law Nicos Stavropoulos 2013 [online].

international and domestic law and the development and modification of that law.⁸⁷ As stated previously, for purposes of this thesis, interpretation produces a justification mechanism for legal change, particularly when there is a need to integrate different legal norms and regulations within an existing legal framework.

In law, norms describe the way something ought to be done according to an interest position. Dworkin has noted that in the most general terms, norms are standards of behaviour created through mutual expectation in a social setting.⁸⁸ “For legal theorists called pluralists, there may be no significant distinction, for example, between law produced by state authorities and norms created by voluntary associations: each may or may not be effective in shaping behavior.”⁸⁹ Stavropoulos notes for pluralists, “it is about the fundamental or constitutive explanation of legal rights and obligations (powers, privileges, and related notions.”⁹⁰ For others, like Hart or Marmor who are often termed positivists, “legal norms can only exist when they are produced through fixed hierarchies, usually state hierarchies.”⁹¹ Thus, legal theorists may agree to a norms importance but then disagree as to where that importance lies.

⁸⁷ Timothy Endicott ‘Legal Interpretation’ in Marmor, Andrei (editor, 2012) *Companion to Philosophy of Law* Oxford Legal Studies Research Paper No. 39/2011.

⁸⁸ Ronald Dworkin *Laws’ Empire* Fontana Press 1986; Ronald Dworkin 2009.

⁸⁹ Nico Stavropoulos 2013 [online], 1; Ronald Dworkin 2009, 2013; Pier Giuseppe Monateri (ed.) *Methods in Comparative Law* Edward Elgar Publishing, Inc. 2012; Richard H. Fallon ‘Reflections on Dworkin and the Two Faces of Law’ (1992) *Notre Dame Law Review* 67.

⁹⁰ Ibid.

⁹¹ Brunnée & Toope 2012:1. H.L.A. Hart *The Concept of Law, 2nd edition* (edited by Penelope Bulloch and Joseph Raz) Clarendon Press 1994 (first edition 1961); Atara Marmor ‘Exclusive Legal Positivism’ in *The Oxford Handbook of Jurisprudence* Oxford University Press 2002; and Andrei Marmor *Interpretation and Legal Theory* Hart Publishing 2005.

As a result, the interpretations of these norms can be conflicting because different interests can be inconsistent with one another. This is particularly evident when the same issue is under consideration and involves the simultaneous application of laws associated with humanitarian intervention, such as the protection of human rights and the use of military force for that protection. It is Sartor's belief that the interpretive process of legal reasoning is an application in the ability to process information in order to come to appropriate determinations.⁹² In this way interpretation will allow for essential change within a broader framework of continuity,⁹³ since the interpretation of legal concepts may require change to the rules defining them. Stavropoulos's comments clarify for this research that "interpretation purports to identify the principles in question and thereby the normative impact of the practice on citizens' rights and responsibilities,"⁹⁴ whilst Dworkin argues that interpretation "is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to belong."⁹⁵

In this same regard, Andrei Marmor states "if the formulation of a particular rule is inadequate for purposes of determining a particular

⁹² Giovanni Sartor *Legal reasoning: A cognitive approach to the law* Springer 2005.

⁹³ Ibid. For an opposing critique on interpretation see Scalia, Antonio (1998) *A Matter of Interpretation: An Essay*, wherein Supreme Court Justice Scalia argues that constitutional law should not be based on 'legislative intention' and 'legislative history'.

⁹⁴ Nicos Stavropoulos 'Legal Interpretivism' (2014) Edward N. Zalta (ed.) *The Stanford Encyclopedia of Philosophy* <https://plato.stanford.edu/archives/sum2014/entries/law-interpretivist/> accessed 13 October 2016.

⁹⁵ Dworkin, 1986:8.

result in certain circumstances, then there is nothing more to explain or understand about its meaning; what is required is a new formulation of the rule – one which would remove the doubt – and this is what the term ‘interpretation’ properly designates.”⁹⁶ This would certainly hold true when contemplating laws associated with humanitarian intervention, given that interpretation will identify the principles in question and their normative impact. In this same regard, Joseph Raz argues, “interpretation is considered a necessary step for the understanding of the exact meaning and purpose of a legal rule. Through interpretation, the uncertain and unpredictable legal rule becomes more certain and more predictable”⁹⁷ „, “it is the revealing or presumption of the real meaning of the legal norm,”⁹⁸ with which this study agrees. As a result, and as Coleman iterates, interpretation is an account of how the “determinants of legal content as authorized fix legal rules.”⁹⁹ Therefore, while the fixed content of the rules of international law (sovereignty or the use of force or attention to human rights) is the same, the underlying difference is whether the rule meets the criteria of effective legality from within the relevant state (unfixed) and how that criterion is interpreted for application.

Ronald Dworkin advances the idea that law is an interpretive concept. He advocates the validity of a legal principle as deriving from a

⁹⁶ Marmor 2005: 117.

⁹⁷ Joseph Raz ‘Why Interpret’ (1996) 9 *Ratio Juris* 349, 63.

⁹⁸ Ibid. For corresponding points of view see: Joseph Raz *Between Authority and Interpretation: On the Theory of Law and Practical Reason* Oxford University Press 2009 and J. Rubenfeld ‘Legitimacy and Interpretation’ in Alexander, L. (ed.) *Constitutionalism: Philosophical Foundations* Cambridge University Press 1998.

⁹⁹ Coleman (30 January 2008:4-5).

combination of facts and moral considerations which then takes an interpretivist approach to law and morality.¹⁰⁰ His position is that because law is interpretive it must provide relevance that coheres with a state's legal system (its statutes, precedents, constitution, etc.).¹⁰¹ Dworkin's approach represents the status of legal sources in both domestic and international law.¹⁰² Dworkin's position is that legal interpretation is primarily the interpretation not of the law, but of its sources, and that to understand why interpretation is central to legal practice requires an understanding of the role of sources in the law; that is, of the reasons for the sources.¹⁰³ Endicott concurs with Dworkin, he argues that legal interpretation is a reasoning process. "It is needed whenever reasoning is needed in order to decide what a legal instrument means and when the law is indeterminate."¹⁰⁴ This rationale would explain the controversy regarding humanitarian intervention decisions following the end of the Cold War,¹⁰⁵ in that there were no formal legal sources in place at the time. Subsequently decision-makers would have

¹⁰⁰ Dworkin 1977: 81-130.

¹⁰¹ "A conception of law must explain how what it takes to be law provides a general justification for the exercise of power by the state ..." Dworkin 1986:190; Dworkin 2009 *Is There Truth in Interpretation?*

¹⁰² Dworkin, Ronald 'A New Philosophy for International Law' (2013) 41, no 1 *Philosophy & Public Affairs* 1, 12-13.

¹⁰³ Ibid at 101 and 102; See also Louis Fisher, who considers interpretation as a political process in decision-making (Louis Fisher *Constitutional Dialogues: Interpretation as Political Process* Princeton University Press 1988). MacCormick and Summers offer a comparative analysis on the use of precedent as a source of law and as a basis for legal arguments in nine different legal systems (Neil MacCormick and Robert S Summers (eds) *Interpreting Precedents. A Comparative Study* 1991). Julie Dickson 2010, discusses the role of legal reasoning in interpretation.

¹⁰⁴ Timothy Endicott 'Legal Interpretation' 2011 in Andrei Marmor (editor, 2012) *Companion to Philosophy of Law* Oxford Legal Studies Research Paper No. 39/2011, 2.

¹⁰⁵ Donald Rothchild *Managing Ethnic Conflict in Africa* The Brookings Institution 1997, 145; Kevin C. Dunn and Timothy M. Shaw (eds) *Africa's Challenge to International Relations Theory* Palgrave 2001; Cohen 2000; Kansteiner 2009.

been unclear about where to focus their strategies in the case of decisions to use force for human rights protection or to not intervene.

In this same regard, Robert Summers and Michele Taruffo conducted surveys on the practice of interpretation in civil and common law in the United States and Europe in the period between 1990 and 2000.¹⁰⁶ The surveys revealed that under modern legal systems, there were numerous ways of interpreting law. Relevant to this thesis are three.

1. Interpreting the legal text on the grounds of precedents set at the time when the given law was previously enforced;
2. Interpretation on the grounds of legal dogmas and doctrines; and
3. Contextual interpretation: interpretation of the legal text where the words of each provision are construed in adherence with the meaning attributed to them when fitted into the entirety of the law or a complete body of related laws.¹⁰⁷

Their research seeks to advance the understanding of the interpretation of law through comparative and international legal context analysis in civil and common law legal systems.¹⁰⁸

Legal Study: Sources of Interest in Interpretative & Positivist Law

As the above illustrates, theorists of international legal study¹⁰⁹ approach

¹⁰⁶ Robert Summers and Michele Taruffo 'Interpretation and Comparative Analysis' in D.N. McCormick & R. Summers (eds) *Interpreting Statutes: A Comparative Study*. Dartmouth Publishing 1991, 464-465.

¹⁰⁷ Ibid.

¹⁰⁸ Ibid., 3. A similar comparative analysis was undertaken in Neil MacCormick and Robert S Summers (eds) *Interpreting Precedents. A Comparative Study* 1991.

¹⁰⁹ International Legal Study comprises various methodological approaches to study law. The scope of this thesis is by no means to make a complete draft of these various methodologies but acknowledges such methodologies hold promise for future writings. Examples of which are, as suggested, sociological jurisprudence and/or critical legal studies. As stated above, the author wishes to establish the role of interpretation at both

the subject of interpretation with very different questions and concerns, to which they give very different answers. O'Connell suggests they argue about how "international law is applied to, and functions within international policy [and] how international legal rules are used by the makers of foreign policy."¹¹⁰ However, most of the theorists agree on one principal characteristic, that:

[A]n interpretation of something is an interpretation of *something* – it presupposes that there is a something, or an original, there to be interpreted, and to which any valid interpretation must be faithful to some extent. Thus, this differentiates interpretation from pure invention and looks to interpretation as an attempt not merely to reproduce but to make something of or bring something out of an original.¹¹¹

Interpretivist law suggests an explanation of how the legally significant action and practices of political institutions adapts legal rights and obligations. "Its core claim is that the way in which institutional practice affects the law is determined by certain principles that explain why the practice should have that role. Interpretation of the practice purports to identify the principles in question and thereby the normative impact of the practice on citizens' rights and responsibilities."¹¹²

the state and international levels when formulating foreign policy through comparative analysis using Ronald Dworkin's views on the interpretative nature of law and the role of legal sources together with Christian Tomuschat's assertions on international law's dependent characteristics, to support the thesis' position.

¹¹⁰ Mary Ellen O'Connell 'Symposium on Method in International Law' (1999) 94, No. 2 *The American Society of International Law American Journal of International Law* 291, 334.

¹¹¹ Julie Dickson 2001, revised 2010. For similar points of views: Fallon 1992:553; Raz 1996:349–63 *Why Interept*; Raz 1996; 'Intention in Interpretation' Rubenfeld 1998; Brown and Kennedy 1994.

¹¹² Stavropoulos 2013 [online].

It is the aim of legal interpretation to “constructively interpret the social practice of law, by imposing purpose upon it such as, to make of it the best possible example of the form or genre to which it is taken to belong.”¹¹³ Interpretivism about law implies the possibility of disagreement about the grounds of law, because it makes law's constitutive explanation a matter of substance, “a matter of the moral justification of the role of institutional history in the determination of rights and obligations. If the question of grounds is substantive, we can disagree about what they are without changing the subject.”¹¹⁴

Positivist law disagrees, however, with the interpretative concept proposed in law. Başak Çali posits, “a central concern of positivist takes on interpretivism is that it will lead to the imposition of values by individual actors rather than telling us anything about the very meaning of international law.”¹¹⁵ Legal positivism “advocates believe that the only legitimate sources of law are those written rules, regulations, and principles that have been expressly enacted, adopted, or recognised by a governmental entity or political institution, including administrative, executive, legislative, and judicial bodies.”¹¹⁶

¹¹³ Dworkin 1986:52.

¹¹⁴ Ibid. Dworkin (1986) *Law's Empire*. For critical comments on Dworkin see David Lyons ‘Moral Limits of Dworkin’s Theory of Law and Legal Interpretation’ 2010 who “concludes that injustice under the law narrows the scope of Dworkin’s interpretivist theory and frustrates its aspirations” (595) nor can it be relied upon as a sound basis for either identifying law or interpreting it (602). Jules Coleman *The Practice of Principle: In Defense of a Pragmatic Approach to Legal Theory* Oxford University Press 2001, wherein he draws a comparison between Hegel and Dworkin’s legal theories.

¹¹⁵ Başak Çali ‘On Interpretivism and International Law’ (2009) 20, No 3 *The European Journal of International Law* 805:821.

¹¹⁶ *Black’s Law Dictionary, 7th Edition* [online]; H.L.A. Hart ‘Positivism and the Separation of Law and Morals’ 1958 71, No. 4 *Harvard Law Review* 593:602-3; and

One of the defining features of the legal positivist understanding of law is the insistence on the separation of law and morality, which interpretivist law is not in agreement with.¹¹⁷ In other words, a state or private action may be legal, and yet immoral, and vice versa, depending on the extent to which it is based on legal rules recognised as valid within the legal system in question.¹¹⁸ Jules Coleman has argued that the core of the separability thesis “is given by what he calls negative positivism: the claim that there is no necessary connection between law and morality. This does not preclude a rule of recognition from incorporating morality into law. It only precludes positivism from claiming that law must necessarily incorporate morality into law everywhere, in all possible legal systems.”¹¹⁹

Contrary to Coleman, Andrei Marmor has stated “that one of the noted problems with the separability thesis is that one can read it as asserting a claim about constraints on the conditions of legal validity or as making a claim about the existence conditions of legal systems.”¹²⁰ This problem is reflected in the positivist approach to human rights in international law which remains impeded by the concept of state sovereignty. This is contrary to the interpretive approach where there is no separation

Joseph Raz *The Concept of a Legal System: An Introduction to the Theory of Legal Systems* Oxford University Press 1970..

¹¹⁷ Hart 1994, 1961.

¹¹⁸ Hart contends that “moral or other normative considerations are not necessarily connected to the existence of a legal system” (Hart 1994, first edition 1961); Raz 1996.

¹¹⁹ Coleman 1983:145-146. As well as Coleman (2008) *Moral Force of Legal Directives* Paper presented at the Hart-Fuller Conference, New York University 2008.

¹²⁰ Atara Marmor 2002:104-124.

between law and morality, although there are differences.¹²¹ Positivist law consequently rejects liberal approaches to law in general.

An example of positivist law is expressed in the United Nations Charter Articles 2(4), 42 and 51 which prohibit states from using force “against the territorial integrity or political independence of any state, except in two circumstances: self-defence or Security Council approval for the use of force ‘to maintain or restore international peace and security’.”¹²²

Simon Chesterman argues that “positivist approaches to international law strongly uphold the principles of sovereignty and non-intervention and would therefore reject the right of humanitarian intervention unless authorized by the United Nations.”¹²³ He explains that these approaches conclude that as a legal concept humanitarian intervention is incoherent. He does note however that “humanitarian intervention may be justified not as a valid use of force against a sovereign state, but because certain actions by a governing regime may invalidate that state’s sovereignty.”¹²⁴ Arguments such as this bring to the forefront the tensions between humanitarian needs and sovereignty, which the Responsibility to Protect attempted to reconcile.¹²⁵

¹²¹ Dworkin 1986; this point is expanded upon by Alexander Green who argues “that law never conflicts with what morality demands” (‘Expanding Law’s Empire: Interpretivism, Morality and the Value of Legality’ 2011 4 (1) *European Journal of Legal Studies* 121).

¹²² Charter of the United Nations, Articles 2(4), 42 and 51 in Evans 2006:9, 42, 51.

¹²³ Chesterman 2002:300-301; Simon Chesterman *Just War or Just Peace? Humanitarian Intervention and International Law* Oxford University Press 2001.

¹²⁴ Chesterman 2001:6; Finnemore 1996; Finnemore 2003.

¹²⁵ ICISS Report 2001.

Fernando Tesón regards the positivist concept of international law as mistaken and believes that an alternative conception of international law operates to meet the needs of citizens; not their governments.¹²⁶ “Legal rules and processes should be interpreted in the light of human values, not state values, and are integral to the debate on what action is justifiable in the event of a humanitarian crisis.”¹²⁷ On the objections concerning human rights protection and the use of force for that protection Tesón contends that “Security Council authorized actions are evidence of a customary international law norm sanctioning unilateral intervention.”¹²⁸

Those critics that challenge legal positivism argue that “not only is law, as a social practice, a profoundly interpretative evaluative in nature, but that any theory about the nature of law is also interpretative in a similar way, and thus, equally evaluative.”¹²⁹ It is Dworkin’s belief that “propositions of law ... provide the best constructive interpretation of the community’s legal practice.”¹³⁰ It is contended here that Dworkin is correct.

¹²⁶ Fernando Tesón *A Philosophy of International Law* Westview Press 1998.

¹²⁷ Fernando Tesón *Defending International Law* 2006:2 (paper presented at the American Society of International Law Centennial Discussion on a Just World Under Law: Why Obey International Law?. The University of Baltimore School of Law.

¹²⁸ Tesón 2006:234

¹²⁹ Dworkin 1977:92. It should be noted that Professor Dworkin is a contemporary critic of legal positivism. For an overview of the “Hart-Dworkin” debate between interpretivism and positivism read Scott J. Shapiro, “The “Hart-Dworkin” Debate: A Short Guide for the Perplexed” March 2007 *Public Law and Legal Theory Working Paper Series 7* University of Michigan School of Law, where in Shapiro “examines at some length the main argumentative strategies employed by each side to advance” between Hart’s theory of legal positivism and Dworkin’s interpretive methodology (2007:2).

¹³⁰ Dworkin 1986:225

To counter these challenges many legal positivism theorists now claim that positivism has always been a normative theory and could only be defended as such.¹³¹ Nonetheless, while they may have emphasized the role of law in guiding human conduct,

[W]hat legal positivists have not done is to meet the challenge of interpretation directly. [W]hile interpretation is an account of how the determinants of legal content as authorized fix law's content [rules] ... What [legal positivists] have been less good at is providing theories of how the content of law is fixed by those factors that are its determinants.¹³²

Therefore, while acknowledging legal positivism's tenets, this thesis shares Dworkin's views on the interpretative nature of law. In that, interpretation will define state perceptions of what is considered correct and valid for each individual legal institution and will develop an understanding of how state and international law interact simultaneously in foreign policy to effect humanitarian concerns.

International Law's Dependent Characteristics

Christian Tomuschat argues that, since international law has "no source of democratic legitimacy on its own, its democratic [autonomous] credentials therefore rest on the democratic processes within a state."¹³³

According to Tomuschat, there is no way to overcome this

¹³¹ Coleman, 2008; Raz 2009.

¹³² Coleman 2008:4-5.

¹³³ Democracy however "requires that the doctrine of separation of powers be prioritized" (Tomuschat 1999, 25). Tomuschat is a German international law scholar who writes on international law as a building block to the international legal community contrasting it to constitutionalism. (Due to space and content limitations the thesis does not address the issue as to whether states that are not democracies would fall into this category.)

dependency.¹³⁴ Tomuschat also notes that the enforcement mechanism, through which the international community seeks to implement its core legal values, does not correspond to the typical understanding held in legal scholarship regarding the state, because international organizations do not have a mechanism for enforcement capacity, but instead rely upon those of their sovereign members and would thus have no capacity to enforce law without domestic state support.¹³⁵ This thesis concurs with Tomuschat's position on international law's dependency. As will be demonstrated in the empirical chapters, this dependency matters since in the case of both France and the United States, their legal structures and perceptions of humanitarian pressures and security will ultimately determine whether or not to use military force in the course of decision-making.

This enforcement mechanism (legitimacy) therefore is what gives a state's government its authority and the standards for that legitimacy are grounded in the state's domestic legal framework. These domestic legal (normative) standards reflect cultural values and define perceptions of what is right and proper for a government and its military forces, including limits and/or justification for the protection of human rights and the use of military force for that protection.

This domestic legal framework is the legitimating function which positions how the interpretative process is established and operates

¹³⁴ Tomuschat 1999.

¹³⁵ Tomuschat 1999. This point is reemphasised in Benjamin Barber's, *Jihad vs McWorld. Terrorism's challenge to democracy* (2003:226).

between humanitarian concerns and foreign policy during the course of decision-making.¹³⁶ It is the process in which the rules of international law are interpreted with reference to policy choice, and how a state legally constructs international law in the course of decision-making concerning decisions to intervene or not. This policy process is “internalised by decision-makers and policy experts, and acts as a source of guidance for conducting and evaluating policies, which defines the range of legitimate methods available in the international system.”¹³⁷ This matters because states will always have other issues to consider and conflict may develop between the justification of human rights and other foreign policy objectives which may prove incompatible, and can often lead to difficulty in the course of decision-making.¹³⁸

To the extent that decision-makers must make decisions in specific cases based on what is happening and what they expect will continue to happen, there may be differing opinions by decision-makers as to what should be done. This is based on the fact that the application of the rules of international law requires legal interpretation according to state decision-makers’ expectations of what best constitutes an appropriate process and how most effectively to control foreign policy behaviour.¹³⁹

¹³⁶ Rosenau 1980; Rose 1998.

¹³⁷ Colin Hay 2002, 197. Randall L. Schweller (2003) discusses this policy process in relation to neoclassical realism.

¹³⁸ David P. Forsythe (editor) *Human Rights and Comparative Foreign Policy* United Nations University 2000.

¹³⁹ Jack Donnelly ‘The Social Construction of International Human Rights’ in Tim Dunne and Nicholas J. Wheeler (eds) *Human Rights in Global Politics* Cambridge University Press 1999:71-102; Emmanuelle Jouannet ‘French and American Perspectives on International Law: Legal Cultures and International Law’ (2006) 58 *Maine Law Review* 292:128.

This process can be understood only by comprehending the objectives and legal status of interests as conceived by those involved in the decision-making process.¹⁴⁰ There will inevitably be different understandings between states when identifying the appropriate degree of state and international dialogue when foreign policy is composed. By reason of the legal systems instituted in most states, there is a dependency upon a dominant set of practices and institutions which provides rules for the effective construction of authorized state institutions. Because of this, the interpretation of international legal principles is dependent on a state's legal interpretation of those principles for application.

Human rights are a specific example of international law's dependency on a state's interpretation for application. In that the justification of human rights alone does not explain the sources of law used to legitimate action in foreign policy. The failure to understand this dependency may obstruct the effectiveness of the international legal principle, since different interests, such as sovereignty and human rights on decisions to use force or not intervene, can be inconsistent with one another.¹⁴¹

¹⁴⁰ See for instance Peter R. Baeh, & Monique Castermans-Holleman *The Role of Human Rights in Foreign Policy, Third Edition* Palgrave MacMillian 2004; Derek Chollet and James M. Goldgeier 'The Scholarship of Decision-Making: Do We Know How We Decide?' *Foreign Policy Decision-Making (Revisited)* Routledge 2002:153.

¹⁴¹ Tomuschat 1999. This is established in the United Nations Charter Articles 2(4), 42 and 51 (Evans 2006).

It is this contestation over the meaning and justification of human rights, as evidenced in the current crisis in Syria¹⁴² and the ongoing conflict in Côte d'Ivoire,¹⁴³ that provides the rationale for state legal structures to legitimate authority, which in turn has the effect of strengthening or weakening the influence of systemic factors; subsequently becoming an essential element to realize state interests.¹⁴⁴ A specific example of this was France's perceived legal obligations towards the Habyarimana regime during the Rwanda genocide¹⁴⁵ or even the United States initial failure to intervene in Somalia, despite State Department reports of the human rights situation.¹⁴⁶

This would indicate, as Tomuschat asserts, that states utilize this dependency to construct international law and its principles legally and politically, within foreign policy during the course of decision-making.

Samantha Besson corroborates Tomuschat's dependent legitimacy theory on international law. She suggests "this so-called dependence condition of legitimacy implies that the law's content be also justified morally, not so much to be valid law but for the authority it claims ever to be

¹⁴² 'Syria: The story of the conflict' (2016) *BBC News*

<http://www.bbc.com/news/world-middle-east-26116868> accessed 3 April 2016.

¹⁴³ «La Côte d'Ivoire en crise». Encyclopædia Universalis [en ligne] <http://www.universalis.fr/encyclopedie/cote-d-ivoire/3-la-cote-d-ivoire-en-crise/> accessed 28 July 2015.

¹⁴⁴ As set-out previously systemic factors comprise the coherent body of ideas or principles that define and shape the international environment characterised by anarchy. Its limits are therefore defined by a state's subjective boundaries. Wendt 1992; Waltz 1959, 1979; Brunnée & Toope 2012; Steven Smith 'Foreign Policy Analysis and International Relations' (1987) 16(2) *Millennium: Journal of International Studies* 345.

¹⁴⁵ Assemblée nationale, Mission d'information commune, Tome 1 Rapport, 26-28.

¹⁴⁶ Jeffrey Clark, 'Debacle in Somalia.' (1993) 72 (1) *Foreign Affairs* 109; United Nations Security Council Resolution 767, S/RES/767 1992.

justifiable.”¹⁴⁷ Further writing “human rights law is itself of no avail” inasmuch as human rights “cannot provide justification external to the law.”¹⁴⁸ Besson’s position gives support to this research in that it is argued, the need for human rights will have to be identified and codified into the state’s domestic legal system¹⁴⁹ for justification prior to the construction of the rules of human rights and/or humanitarian intervention within the domestic legal-policy process.

Furthermore, while there may be agreement upon which international legal principles to use in the course of decision-making, the application is always open to interpretation, because effectiveness rests upon interpretation. Thus the way facts are legally interpreted and how the legal arguments are presented will provide a basic understanding of the conflict situation at issue and consequently have an impact on the decision-making process.¹⁵⁰ As will be determined in the empirical chapters, whether international law could authorise use of force for humanitarian concerns can only be decided by the state concerned on issues that support or negate that decision regarding international law’s effectiveness during decision-making. This combination of domestic and international factors will vary from state to state.

This thesis agrees with Tomuschat’s assertions regarding international law’s dependent characteristic and contends that states utilize this

¹⁴⁷ Samantha Besson ‘Justifications’ in Moeckli, Daniel, Sangeeta Shah & Sandesh Sivakumaran *International Human Rights Law* Oxford University Press 2014:38.

¹⁴⁸ Besson 2014:35.

¹⁴⁹ Donnelly 1999:71.

¹⁵⁰ Ibid.; Jouannet 2006; Forsythe 2000; Brunnée and Toope 2012.

dependency to establish international law's presence within foreign policy, producing a synthesis that is used to regulate the foreign policy objectives of states.¹⁵¹

Is Interpretation a Barrier to Research?

For any state, the observance or the violation of international law is seen largely within the context of its foreign policy; but to what extent do states observe international law and in what ways might this influence foreign policy decisions?¹⁵² International law has long been part of the international system, although it is a common view that the norms of international law are so widely disregarded as to be largely irrelevant to the behaviour of nations.¹⁵³ However, in almost every instance in which states have resorted to the use of force, they have explained or justified their actions by reference to the law of the United Nations Charter and

¹⁵¹ Criticisms of this approach include Michael Goodhart 'Human Rights and the Politics of Contestation' in *Human Rights at the Crossroads* Oxford University Press 2014:31, who writes on the contradictions of implementing human rights through the legal and political systems of nation-states and the tension created in doing so; and David Forsythe, "the role of human rights in foreign policy has always been a contested issue in international relations. History shows that the prominence given to human rights in foreign policy debates has tended to vary depending on the particular paradigm under consideration" (Forsythe 2000:209). For supporting rationale on this thesis's position, see McDougal & Reisman (1981:355-377) "The Prescribing Function in the World Constitutive Process: How International Law Is Made" and Rosalyn Higgins *Problems and Process, International Law And How We Use It* Clarendon Press (2004:5); Grigorii, I. Tunkin, *Droit International Public: Problèmes et Théoriques* Editions Pédone 1985:87.

¹⁵² Abram Chayes *The Cuban Missile Crisis: International Crisis and the Role of Law* (2nd edition) Oxford University Press 1987; Christine Gray *International Law and the Use of Force* Oxford University Press 2000; James Meernik 'Reaching Inside the State: International Law and Superior Liability' (2004) 5(4) *International Studies Perspectives* 356; Anthony Carty 'Visions of the Past of International Society: Law, History or Politics?' (2006) 69 (4) 69 (4) *Modern Law Review* 644.

¹⁵³ Bruno Simma *The Charter of the United Nations: A Commentary, Third Edition* Oxford University Press 2002. "The question of whether there is international law no longer matters, as it is assumed the Geneva Conventions and UN Charter inhibit these rules (or at least most of them). But nothing has really changed the old grounds for challenge remain" (Dworkin 2013:2).

the exceptions provided therein.¹⁵⁴ Thus as Dworkin noted, the problem is not that international law is irrelevant, but rather it lies in the interpretation of the principles of international law because interpretation is believed to be the right of a state.¹⁵⁵

Despite the seeming relevance of international law, minimal consideration has been given to how states interpret international law and even less consideration has been given to the methods states use to make those interpretations.¹⁵⁶ Without interpretation there can be no state action, and therefore, interpretation must be regarded as a preliminary step to foreign policy decisions, indicative of the behaviour of a state in its relationship to international law.

To understand how international law determines the course of a state's foreign policy, it is necessary to understand how states arrive at different interpretations of the same rule of international law. In law, rules describe the way something ought to be done according to an interest position.¹⁵⁷ Interpretations of these rules (or norms) can be conflicting

¹⁵⁴ For example, the majority of interventions after 1990 were authorised. This includes the landmark decision for intervention in Somalia (Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, UN Doc S/23500 1992, (1992) *UNYB* 33, in Chesterman 2002:300-301) and the Resolutions authorising humanitarian action in Rwanda (Daryl Ludlow, 'Humanitarian Intervention and the Rwandan Genocide' (Spring 1999) 19 No.1 *Journal of Conflict Studies* 1).

¹⁵⁵ Ronald Dworkin 2013:2.

¹⁵⁶ "The retention of a power-law dichotomy has effectively blocked moves towards a more sophisticated conceptualization of the significance of international law to international politics" (Boyle 1989:198); See also, Scott 1994:313.

¹⁵⁷ Various scholars discuss this point, for instance: Finnemore and Sikkink 1998:888; Friedrich Kratochwil 'How Do Norms Matter?' in Michael Byers (ed.) *The Role of Law in International Politics*. Oxford: Oxford University Press 2000:35; Martha Finnemore 'Constructing Norms of Humanitarian Intervention' in Peter J. Katzenstein (ed) *The*

because different interests can be inconsistent with one another, such as laws on the use of force and human rights. Therefore, how can states agree that a particular international legal rule exists, but then understand the rights or obligations of that rule in different ways? Although states may agree that the principle of human rights exists (as well as laws on the use of force) the obligations under this principle are interpreted differently and will affect the protection of civilians.¹⁵⁸ This is particularly accurate when civilians are caught within intra-state conflict.

Such contestation over the meaning and interpretation of human rights is based on external normative grounds which state and international legal systems find difficult to reconcile relative to legal authority.¹⁵⁹ This raises complex questions as to the implementation of human rights in both state and international legal systems and how the function of human rights may or may not effect legal change at both levels.¹⁶⁰ Onuf highlights that this is particularly seen when one takes into account there are differences between the domestic level and the international level, “as the latter lacks the formalization of the former and as we can find, therefore more self-referential rules.”¹⁶¹ However, Onuf further notes that “law they are, whatever damage this does to the positivist

Culture of National Security: Norms and Identity in World Politics Columbia Press 1996; Ronald Dworkin 1986; to name but a few

¹⁵⁸ Ibid. for example.

¹⁵⁹ See for instance Wendt 1992; Kenneth H. Waltz *Man, the State, and War: A Theoretical Analysis* Columbia University Press 1959:201; Colin Hay 2002; Brunnée and Toope *Legitimacy and Legality in International Law: An Interactional Account* Cambridge University Press 2010; Colin Wight, *Agents, Structures and International Relations* Cambridge University Press 2006; Jennifer Sterling-Folker ‘Realist Environment, Liberal Process, and Domestic-Level Variables’ (March 1997) 41, no 1 *International Studies Quarterly* 7.

¹⁶⁰ Ibid.

¹⁶¹ Onuf 1985:409.

conception of proper legal order” and concludes “that the international legal order, although lacking a constitutional template for extrusion of legal rules, is very much a legal order,”¹⁶² despite the process of argumentation that produces legal decisions.

Kratochwil concurs with Onuf with regard to the interpretation of international law as being quite different from that of domestic law. Kratochwil argues however, “law in international society exists simply by virtue of its role in defining the game of international relations. It informs the respective decision makers about the nature of their interaction and determines who is an actor; it sets the steps necessary to insure the validity of their official acts and assigns weight and priority to different claims.”¹⁶³ Of significance, particularly for this research, Kratochwil argues that the international legal process is inextricably linked to domestic politics.¹⁶⁴

In adopting this perspective, this thesis theorises that, as Tomuschat suggests, based upon international law’s “lack of basic democratic [autonomous] credentials”,¹⁶⁵ resolution of this issue will not be found in the framework of the international system but rather in the domestic legal framework of the state, since states develop their own legal interpretations through state norms and by means of the legal-political bodies applying those norms. This includes the legal beliefs held by

¹⁶² Onuf 1985:410.

¹⁶³ Kratochwil 1989: 56.

¹⁶⁴ Kratochwil 1989:10-11; Sinclair 2010.

¹⁶⁵ Tomuschat 1999:25.

states and the domestic legal institutions and written sources which protect those beliefs. It is this domestic legal framework which is positioned between humanitarian concerns and foreign policy that constitutes how decision-makers understand the role and purpose of domestic and international law and how this determines foreign policy decisions.¹⁶⁶ Given that similar factors could plausibly be expected to cause different foreign policy actions. As Most and Starr summarise, in other words, policy decisions are significant not only because of their substantive outcomes but because of the way those decisions are composed by way of legislative and legal text during the course of decision-making.¹⁶⁷

The Absence of Prescribed Mechanisms

Based on the fact that there are no prescribed mechanisms in place to address interpretation, the assumption that states prescribe a single meaning to international law would seem inaccurate since each state composes foreign policy with its own approaches and understandings to the international environment and would therefore look to different legal interpretations and methods toward international law to legitimate its foreign policy.¹⁶⁸

¹⁶⁶ Hay 2002; Schweller 2003;

¹⁶⁷ Most and Starr 1984:383-406.

¹⁶⁸ Ryan K. Beasley *Foreign Policy in Comparative Perspective: Domestic and International Influences on State Behavior* CQ Press 2013; 'The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association' (1991) 85 No. 2 *American Journal of International Law* 358; Louis Henkin, *International Law: Politics and Power* Martinus Nijhoff 1995.

This interpretive position is strengthened given international law's vagueness, its under-enforced character and its focus on state practice, which gives the state a significant advantage in the application stage during the formation of foreign policy (as noted in the prior section).¹⁶⁹ These are essential elements when contrasted to other international rules with agreed upon mechanisms. For instance, treaty rules and obligations and especially rules in multilateral treaties are prescribed with institutional mechanisms for supervision and enforcement. These mechanisms include authority. Avoidance would therefore be clearly visible during implementation of the treaty.¹⁷⁰ Nevertheless, since the interpretation of the law and its rules are based upon the state and its domestic legal framework, the treaty may be limited in its application since compliance with the treaty is not the same as enforcement of the treaty.¹⁷¹ This is germane to this thesis in light of the fact that no treaty implements itself and implementation occurs primarily at the state level.

Adding to the importance of a state's legal interpretation of international law is the flexibility afforded the law-making processes in the late twentieth century under the dominance of the West wherein formal sources diminished in importance, while at the same time the 'interests of the international community or humanitarian pressures increasingly

¹⁶⁹ Tomuschat 1999; Most and Starr 1984.

¹⁷⁰ 'General Principles of International Law' 2006 1, Issue 4 *International Judicial Monitor* American Society of International Law and the International Judicial Academy; Vienna Convention on the Law of Treaties (VCLT) [online] http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf accessed 31 March 2013.

¹⁷¹ Zhang Naigen 'On International Law of Treaty Interpretation' 2010 6, No. 6 *Canadian Social Science* 1:2.

gained in status as elements in the development of new international legal norms. This is observed in the Convention on the Prevention and Punishment of the Crime of Genocide.¹⁷² The Convention which defines genocide in legal terms was adopted in 1948.¹⁷³ The laws of the Convention however were not enforced until 1998 during the International Criminal Tribunal for Rwanda.¹⁷⁴

Even with respect to treaty law, one could ask to what extent the existing rules of interpretation such as those as set out in the Vienna Convention on the Law of Treaties (VCLT) provide an adequate basis for the interpretative functions surrounding the complications associated with humanitarian challenges in the international community.¹⁷⁵ Especially since there are “three commonly acknowledged approaches to treaty interpretation, which correspond to methods of construction of any legal text—including constitutions, statutes, and contracts.”¹⁷⁶ Consequently, there is a tendency among various scholars,¹⁷⁷ and even among various

¹⁷² *Convention on the Prevention and Punishment of the Crime of Genocide* Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948 https://www.oas.org/dil/1948_Convention_on_the_Prevention_and_Punishment_of_the_Crime_of_Genocide.pdf accessed 19 September 2017.

¹⁷³ Ibid.

¹⁷⁴ Ramesh Thakur ‘No more Rwandas’: intervention, sovereignty and the responsibility to protect March 2004, 26 *Humanitarian Exchange Magazine* 3.

¹⁷⁵ The United Nations also questioned the interpretative applicability of the 1949 Geneva Conventions for the protection of war victims. Also see the 1977 Additional Protocols in peace-keeping operations in its legal opinion: Summary Record: GLIN ID 143396, *Legal Literature, United Nations Juridical Yearbook*, Date: 17/09/1992. “Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) set forth the basic rules of treaty interpretation” (‘General Principles of International Law’ 2006 1, Issue 4 *International Judicial Monitor*, American Society of International Law and the International Judicial Academy.

¹⁷⁶ *International Judicial Monitor* 2006.

¹⁷⁷ “The Vienna Convention on the Law of Treaties provides that the interpretation of a treaty may be influenced by practice”, O’Connell 2000:89; “L’interprétation des notions de ‘conflit armé interne’ et de ‘violence aveugle’ dans le cadre de la protection subsidiaire: le droit international humanitaire est-il une référence obligatoire?”,

tribunals, to rely more on one type of interpretative approach than others in arriving at the final interpretation of a treaty provision.¹⁷⁸

Moreover, although Article 27 of the Vienna Convention (VCLT) establishes an obvious rule in international law that states may not neglect their international obligations upon their domestic law. Article 27 says nothing about how a state's domestic legal system should define their interpretation of international law into state law, nor does it discuss the legal process of international law in domestic law.¹⁷⁹ "The [Vienna] Convention does not invoke any concept of 'consideration' or 'cause' for the purpose of determining the obligatory effect of treaties."¹⁸⁰ Which as this thesis argues is puzzling since systemic pressures must be translated through the state's unit-level variables such as decision-makers' perceptions and state structure to assure authority.¹⁸¹

Therefore if the intended role of an enforcement mechanism, such as the Vienna Conventions in this instance, is to ensure that international policy is implemented but the language of the treaty is ambiguous in certain aspects or there is an absence of language, then the strength of its enforcement has not been institutional designed to promote consistent

Périlleux 2009:113-143 (discusses the situation of internal armed conflict and problems associated with the interpretation of protection concerning the Geneva Convention of 28 July 1951); Zhang 2010.

¹⁷⁸ *International Judicial Monitor* 2006:1.

¹⁷⁹ VCLT Article 27 [online]. In addition see, les rapports entre le droit international et la droit interne". Science et technique de la démocratie, n° 6 (1993). Commission Européen pour la Démocratie par le droit, Assemblée parlementaire du Conseil de l'Europe, Commission de Venise, CDL-STD(1993)006, des résultats de Professor C. Economides (Grèce).

¹⁸⁰ Matthew Craven 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law' (2000) *11 European Journal of International Law* 489:501.

¹⁸¹ Rose 1998; Hay 2002:197; Schweller 2003; Lobell, Ripsman and Taliaferro 2009.

standard practice. This was clearly established in its lack of enforcement during the Rwandan genocide and the current arguments concerning the Responsibility to Protect and the use of military force in Syria.¹⁸²

Furthermore, since there are no parameters specified to measure inferred standards, to what extent do the existing rules of interpretation such as those as set out in the Vienna Convention represent an adequate basis for the interpretative functions surrounding the complications associated with human rights challenges in the international community? Indeed, with the ever-increasing growth of international law, and particularly law concerning humanitarian pressures, where do humanitarian intervention and its interests in effect interact with a state's legal behaviour concerning the course of action to be taken in the formation of foreign policy?

2. How Legal Behaviour Shapes Foreign Policy Toward International Law

As Friedman's states, a state's legal behaviour is shaped by its traditions. Legal traditions "comprise a set of common principles, values and concepts, a shared discourse and practice and are parts of a particular tradition of thought."¹⁸³ This set includes sources of law, the way law is

¹⁸² Edward Luck. *Limitations and Responsibilities: Prof. Edward Luck Discusses R2P*. (9 November 2011). Parliamentarians Network for Conflict Prevention. <http://www.parliamentariansforconflictprevention.net/meeting/limitations-and-responsibilities-prof-edward-luck-discusses-r2p>.

¹⁸³ Lawrence M. Friedman *The Legal System: A Social Science Perspective* Russell Sage Foundation 1975:223.

created within a particular state, and the application of that law.¹⁸⁴ The legal tradition of a state will therefore have a central influence on legal behaviour subject to the rule of law, resulting in different perspectives regarding the course of action to be taken in similar situations.

If one considers that law (domestic and international in the context of this thesis) is dealt with through the state's legal institutions, examining the role of domestic law as a constitutive factor in the state's decision-making process provides the framework through which decision-makers interpret international law. In this way decision-makers will base their decisions on the appropriate form of interpretation based upon their beliefs in the role of law, the way law is created and sources of law. Each of these aspects clarifies for the state the shape foreign policy will take. This clarification includes the primary purpose of the domestic and international laws as recognised within the state; as well as how new law is created or existing law is amended.¹⁸⁵ For instance, legal tradition which understands that changes in law come about through actions consistent with changes in society, may interpret international rules in the same way. States where international law has been incorporated into the domestic legal system will likely interpret existing international legal

¹⁸⁴ "It depends to a large extent on the legal system that you yourself are accustomed to. If you are educated in the Anglo-American common law tradition your first impression will be different from that of, say, a French, a Dutch or a German jurist" (Monateri 2012).

¹⁸⁵ This contrasts between the "bottom-up," incremental approach of common law generally, and United States law in particular, to the approach of many civil law systems which are built on "top-down" legal structures as in France (Richard A. Posner 'Legal Reasoning from the Top Down and from the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 Chicago Law Review 433).

rules differently from a state whose legal traditions challenges incorporation.

The Legal Systems of France and the United States

National legal systems invariably have particular rules for the interpretation of [international] legal norms ..., to give uniform effect to their provisions in national law irrespective of whether the legal system has a dualist or monist approach.¹⁸⁶

Monism and dualism are used to describe two different theories of the relationship between international law and state law.¹⁸⁷ For this reason the legal systems of France (monist) and the United States (dualist) were chosen to illustrate the thesis position concerning interpretation.¹⁸⁸ France and the United State share many similarities, originating from the revolutionary beliefs that form the basis of their state identities. Both states developed however under individual historical circumstances which led each to be influenced by distinctive legal and political institutions. Although France and the United States share values inherent in most democratic societies with constitutional legal systems, such as liberty, equality and justice, the two have very different legal perspectives concerning aspects of international law and its

¹⁸⁶ Mr. Justice John L. Murray, Report of President of the Supreme Court and Chief Justice of Ireland. *Methods of Interpretation – Comparative Law Method* 2009:40.

¹⁸⁷ Ibid.

¹⁸⁸ René David, *French Law: Its Structure, Sources and Methodology* (translated by Michael Kindred) Louisiana State University Press 1972; Claire M. Germain, 'Approaches to Statutory Interpretation and Legislative History in France' 2003 13 *Duke Journal of Comparative & International Law* 195; Lawrence M. Friedman, *A History of American Law*, 2nd edition Simon & Schuster 1984; Mary Ann Glendon, Michael W. Gordon and Christopher Osakwe *Comparative Legal Systems*, 2nd Edition West Publishing 1994.

application.¹⁸⁹ These inherent differences in legal perspective present both possibilities and problems for each state's normative vision given that each state has an interpretive belief.¹⁹⁰ Consequently, interpretations and applications of law made by the two states are different regardless of the legal matter.¹⁹¹

Both states will adhere to the rules of international law, but each will take a different approach in its interpretation and consideration of international law.¹⁹² So a certain rule may be valid law in France, but not in the United States - which is to say that it satisfies the conditions necessary for being law in France but not those pertaining to the United States. This assumes that the content of the rules is the same, but the underlying difference is whether the rule meets the criteria of effective legality in the relevant jurisdiction. Effective legality is assessed by either the Conseil d'État in France or the State Department Legal Advisor

¹⁸⁹ As will be established in the next section, an entire section of the French Constitution is *devoted* to international treaties and their role as law in France (The Constitution of France (1958) <http://www.assemblee-nationale.fr/connaissance/constitution.asp>. [online]. Emmanuelle Jouannet 'A Century of French International Law Scholarship' (2009) 128 *Maine Law Review* 61:1, 39). Whereas the structure of the United States legal institutions "makes incorporation of international law into the domestic system difficult" (Emmanuelle Jouannet, 'French and American Perspectives on International Law: Legal Cultures and International Law' (2006) 58 *Maine Law Review* 292, 442; John, F. Murphy *The United States and the Rule of Law in International Affairs* Cambridge University Press 2004:74-85; Paul W. Kahn *American Hegemony and International Law: Speaking Law to Power: Popular Sovereignty, Human Rights, and the New International Order* (2000) 21 *Chicago Journal of International Law* 1.

¹⁹⁰ Mitchel Lasser *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy* Oxford University Press 2004:23.

¹⁹¹ Monateri 2012; Beasley 2013; Lasser 2004; Neack 2003; Germain 2003; Glendon, Gordon & Osakwe 1994. For a different perspective on interpretation see Alex Obote-Odora 'Rape and Sexual Violence in International Law: ICTR Contribution' (2005) 12(1) *New England Journal of International and Comparative Law* 135.

¹⁹² The implementation of international law within the state's legal systems is one of the classical problems of international law, "normally discussed under the heading of monism and dualism" (Reus-Smit 2004:40).

in the United States.¹⁹³ It is the duty of the legal adviser to counsel the government on the existing international law in respect to a particular issue or situation, so that state policy does not conflict with international law.¹⁹⁴

The fundamental differences in judicial control and the ways in which the legislature of France and the United States exert authority and thus their interpretation and application of international law, forms the core basis for the different approaches both states take with respect to international law.¹⁹⁵ The differences reflected through state norms and by means of the legal-political bodies which apply those norms connects the historical development of each legal system to the modern view of law and determines the ease with which international law is interpreted and viewed as part of a modern legal system.

As stated above, to address the practice of legal interpretation and the manner in which foreign policy is justified, it is necessary to understand the legal perception expressed by each state when addressing humanitarian concerns at the international level. This includes the

¹⁹³ Le Conseil d'État (Council of State) provides the executive branch with legal advice and acts as the administrative court of last resort. (Françoise Bouchet-Saulnier, formerly under-directeur des affaires juridiques, Paris, 2009). The State Department Legal Advisor in the United States is much the same as in France in that it performs the same role and is made up of the same high-level US legal officers.

¹⁹⁴ On the role of the legal advisor see Scharf 2010; 'The Role of the Legal Adviser of the Department of State: A Report of the Joint Committee Established by the American Society of International Law and the American Branch of the International Law Association (April 1991:358-373); 'International Law and United States Foreign Policy: Some Reflections on the ASIL/ILA Report on the Role of the Legal Adviser' (Spring 1991:201-208); Guillaume 1991:136, 147.

¹⁹⁵ In the United States the case of *Pennoyer v. Neff*, 95 U.S. 714 (1877) "establishes precedent for jurisdictional competence to make and/or apply law".

differences in legal systems. By itself comparative law therefore remains essential when considering communication between different legal systems and in shaping foreign policy.¹⁹⁶

France

Since the French Revolution, French law is made only by the representatives of the people. This has largely meant the legislature, but has also included the executive branch. Such as when Charles de Gaulle enhanced the role of the executive in the legal process after World War Two and President Mitterrand during the Rwanda conflict.¹⁹⁷ Accordingly, France relies upon a civil legal system that facilitates the inclusion of international legal principles into France's domestic legal framework and constitutes the framework under which France's decision-makers will interpret international law.¹⁹⁸

The primary source of law is written law, including the French Constitution and the French Codes. Judicial decisions are not considered sources of law and the judiciary does not have the power to interpret French law in such a way as to create a new legal principle.¹⁹⁹ Academic doctrine also has a role in French law but it maintains a certain

¹⁹⁶ Lasser 2004.

¹⁹⁷ Niagalé Bagayoko-Penone *Afrique: les stratégies française et américaine*. L'Harmattan 2003; Sylvain Touati 'French Foreign Policy in Africa: Between Pre Carre and Multilateralism, An Africa Programme Briefing Note' (February 2007) *Chatham House Report* [online].

¹⁹⁸ French state law is a combination of Roman law, canon law and local custom, Jouanne 2006; see also René David 1972. For an overview on French law see, Claire Germain 2003, and Claire M. Germain, and Charles Szladits, (2d rev., ed) *Guide to Foreign Legal Materials: French* Dobbs Ferry and Oceana Publications 1985.

¹⁹⁹ Article 5 of the French Civil Code specifically prohibits the practice of case law (*les français du Code Civil, l'Article 5, 2*); Michael Lasser 2004:37.

intermediary status. There has not been any power afforded the judiciary to make or amend law in French history since post-Revolutionary. Sources of law may be changed or modified only in the same way they were created, through amendment by Parliament.²⁰⁰ Although this lack of judiciary power allows for an efficient procedure for making law, the development of interpretations of the law are stifled by the prohibitive political process inherent in the legislative branch.²⁰¹

The French Constitution of 1958 also created in France a monist system in terms of the incorporation of international law into the domestic legal structure.²⁰² An entire section of the French Constitution is *devoted* to international treaties and their role as law in France.²⁰³ In the event of a conflict between an international treaty and France's Constitution, legislative space is created that allows the Constitution to be amended before the international treaty commitment is accepted. Once ratified by the Executive or National Assembly, treaties become law in France and are treated in the same way as domestic law.

This process facilitates the recognition and application of international law into the French legal system.²⁰⁴ Based upon these legal characteristics, this thesis expects that France will follow a traditional method of interpretation of international law, particularly in cases where

²⁰⁰ David 1972; Germaine 2003; Michael Lasser 2004:34.

²⁰¹ Ibid.; Jouanne 2006; Adrian Treacher, 'French Foreign Policy' (2nd edition) in Beasley *Foreign Policy in Comparative Perspective* Sage Publishing, CQ Press 2013.

²⁰² The French Constitution (1958) [online].

²⁰³ Ibid.

²⁰⁴ Les rapports entre le droit international et la droit interne 1993 [online].

the choices are between adopting a long-standing interpretation of international law and advocating new interpretations.

United States

By contrast, the United States relies upon a common law system which utilizes law primarily as a method to protect individual interests, which is grounded in legal history.²⁰⁵ The common law system often emphasizes the historical development of legal concepts. This leads to the analysis of older case precedent in order to determine whether the law is still applicable to current societal needs or whether incremental change is called for.²⁰⁶

Unlike France, the structure of the United States legal institutions “makes incorporation of international law into the domestic system difficult.”²⁰⁷ Sources of law are also significantly different. Although Congress is responsible for passing legislation, which is considered the law, the highest form of law is that of the United States Constitution. For this reason, no legislation, judicial decision nor international legal principle can take precedence over the provisions set forth in its Constitution. For instance, because human rights are considered part of

²⁰⁵ Jouanne 2009; Friedman 1985.

²⁰⁶ Clifford Larsen, UBS Professor of Law 2007 *Distinguishing Features of the United States Legal System*, Opening commentary for The Institute of Advanced Legal Studies Conference, *Learning from Each Other: Enriching the Law School Curriculum in an Interrelated World* (China), Larsen emphasizes that the United States legal system has three distinguishing features that contrast with other legal systems: the Constitutional Order; the legacy of common law; and a participatory legal culture. See also, McDougall & Reisman (1969, 3 *International Lawyer* 438, 444) discusses customary international law’s ability to transform to meet societal needs.

²⁰⁷ Jouanne 2009:39-42; John F. Murphy *The United States and the Rule of Law in International Affairs* Cambridge University Press 2004. 74-85; Kahn 2000.

the law of the United States, federal courts have jurisdiction over international human rights laws as a matter of law under international law. As a consequence the interpretation of an international legal principle is limited by both the Constitution and the judiciary.²⁰⁸

This authority afforded the judiciary has a large influence on how law is created in the United States because creation of law by the judiciary and creation of law by the legislature are two very different entities.²⁰⁹ Unlike the French legal system, the separation of powers includes substantial powers for the judiciary, including the power of judicial review.²¹⁰ This difference is characterized by the fact that the courts create law based on actions already taken and the legislature debates law first and then passes the law. Even though the Supremacy Clause²¹¹ allows for the automatic incorporation of ratified treaties which places them in a position to be applied by the court, legislative approval concerning treaties will be influenced by its dependency upon ensuing statute and case law.²¹²

²⁰⁸ Kahn 2000; Fisher 1988; Lasser 2004:73.

²⁰⁹ *Ex parte Merryman*, 17 Fed. Cas. 144 (C.C.D. Md. 1861); Fisher 1988.

²¹⁰ The separation of powers system distinguishes the US government structure from more traditional parliamentary systems.

²¹¹ Article VI, Section 2, of the U.S. Constitution is known as the Supremacy Clause “it provides that the Constitution, and the Laws of the United States ... must prevail over any conflicting or inconsistent state exercise of power.” The concept was developed in *McCulloch v. Maryland*, 17 U.S. 316, 4 L. Ed. 579 (1819).

²¹² For US case law illustrating this: *Foster & Elam v. Neilson* 27 U.S. 253 (1829); *Missouri v. Holland* 252 U.S. 416 (1920) *Reid v. Covert* 354 U.S. 1 (1957) landmark decision wherein the United States Supreme Court ruled “if a treaty is contrary to the Constitution, then the Constitution supersedes international treaties ratified by the United States Senate”.

As a result, this dualist approach to international law means that any international agreement not ratified is not automatically incorporated into domestic laws.²¹³ This approach is also determined by what is known as “American exceptionalism” which can lead to isolationism or involvement. Historically therefore the United States has proved more likely than France to apply liberal interpretations toward existing legal principles of international law.²¹⁴

Differences Establishing a Rule of Customary International Law

The way France and the United States recognise the existence of a rule of customary international law through foreign policy is also revealing of their differences in their legal systems. These differences are set out in contemporary debates concerning issues on the use of force and humanitarian intervention. The United States generally develops more of a policy-oriented approach which leads the US to consider its acts and behaviours as decisive.²¹⁵ In applying this approach the United States goes beyond France’s legal formalist approach by insisting on the primacy of a customary law that is more adapted to specific situations and also more directly based on moral and political values. At the same time, and based upon the French formalist legal system, France engages in a more restrictive interpretation of the material aspect of customary law so as not to systematically devalue the formal text as such.²¹⁶

²¹³ Murphy 2004:80-85.

²¹⁴ Murphy 2004; Paul Kahn 2000.

²¹⁵ Myres S. McDougal ‘Law as a Process of Decision: A Policy-Oriented Approach to Legal Study’ (1956). Yale Law School Faculty Scholarship Series, Paper 2464, 64.

²¹⁶ Jouannet 2006:25-28; Lasser 2004.

For research purposes within this study, this means that in France because the French Constitution fixes the hierarchy of laws and rules within the French legal system, the interpretation of use of force and/or human rights should rely upon the statutes as written for that time period. In the French case studies, policy decisions are therefore expected to be *devoted* to the content of the law as written. This is based on the fact that international law is recognised in French law and it is considered a binding source of law in the same way the constitution or civil codes are considered binding. This is perceived as a commitment in law that is tied to the responsibility of maintaining an existing situation even though that existing situation may be considered unsatisfactory.²¹⁷

The 1958 French Constitution effectively deals with human rights as applied in French law. However, Africa is also integrated into the French Constitution which will present a legal conflict for France between human rights and its ties to Africa.²¹⁸ That is to say that France's interpretation of human rights will be tied to where it places the higher priority – human rights protection or its sphere of influence (*pré carré*).

In the United States cases, the interpretation of a humanitarian situation must be compatible with the principles of the Constitution.²¹⁹ It will be necessary to determine what the existing law is [on humanitarian

²¹⁷ Jouannet 2006:315; Lasser 2004:55-57.

²¹⁸ Article 72 of the French constitution of 1958, sets out the territorial units of France's Fifth Republic [online].

²¹⁹ Friedman 1985; Fisher 1988; Larsen 2007.

concerns] to decide whether or not to intervene; and then look to additional legal material and extract specific rules to support a foreign policy decision. The application of which may be elaborated upon in legal-political decisions for human rights protection as well as the use of force for that protection from which precedent may adapt new rules precipitated by humanitarian concerns. Thus, it might be expected as a result of the US Constitution as well as United States' interest at the time, the use of force and human rights may create a conflict between the norms of international law and facts related to the humanitarian situation. This will result in different approaches to decisions on whether to use military force to intervene or not intervene and will further determine the authoritative role of international law in policy decisions.

Ultimately, the issue of how much international law will affect either France or the United States' legal position with respect to laws on human rights protection and the use of military force for that protection is difficult to ascertain. While the purpose of international law is that relations between states should be governed by customary rules,²²⁰ those rules are determined by state interest, which is often determined by domestic concerns and applicable law. It is from this position that differences relating to interpretation for the use of force as the right of the state have become one of the more controversial issues relating to

²²⁰ Malcolm N. Shaw *International Law, Fifth Edition* Cambridge University Press 2008.

foreign policy when humanitarian issues arise.²²¹ Whether it is the United Nations Charter, or state responsibility under international humanitarian law, existing studies²²² on the status of international law in the legal-political system come from the position that all states accept the same meaning of the international legal principle at issue and that all actions or non-actions are measured in terms of that single meaning, but this position needs to be reconsidered. Particularly when the interpretation of that principle ultimately affects the course of action a state may be willing to take in humanitarian intervention.²²³ As a result, obligations under the principle of human rights are interpreted differently and will affect the protection of those rights.

Therefore, this thesis assumes that international law is a factor in a state's decision-making process because of a state's constitutional processes, a state's interpretation of international law is a central component of foreign policy formulation and the foundation upon which states ultimately act in the international system. This research analyses

²²¹ For instance see: Derek H. Chollet and James M. Goldgeier 'The Scholarship of Decision-Making: Do We Know How We Decide?' (2002) *Foreign Policy Decision-Making (Revisited)* 153-179; Michael J. Glennon *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* Palgrave 2001; J.L. Holzgrefe 'The Humanitarian Intervention Debate' in L.J. Holzgrefe & Robert O. Keohane (eds) *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* Cambridge University Press 2003; Michael Ignatieff 2003; James Pattison *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* Oxford University Press 2010.

²²² Valerie J. Lofland 'Somalia: US Intervention and Operation Restore Hope' (2002) in *Case Studies in Policy Making*, Naval War College 56; Patrick M. Regan *Civil Wars and Foreign Powers: Outside Intervention in Intra-state Conflict* University of Michigan Press 2000; Dylan Balch-Lindsay and Andrew J. Enterline 'Killing Time: The World Politics of Civil War Duration, 1820-1992' (2000) 44 (4) *International Studies Quarterly* 615; David Forsythe 1990; Ogengau Otunnu *An Historical Analysis of the Invasion by the Rwanda Patriotic Army (RPA)* Transaction Publishers 1999; are but a few case studies.

²²³ Weber has defined this as legitimate authority (Brown and Ainley *Understanding International Relations* Palgrave Macmillan 2009:73).

how international law is used in decisions to use force in foreign policy, not *whether* it is used, since this will ultimately determine the course of a state's foreign policy.

3. International Legal Study and Foreign Policy Analysis

Traditional methodological approaches are somewhat limited in scope when analysing the current relationship between international law and foreign policy due to globalisation, threats to peace, and more diverse security issues. McClelland and Pfaltzgraff note that “theories of international relations were notably deficient in their ability to predict the end of the Cold War. Moreover, the dramatic and accelerating changes that have transformed the world since the end of the 20th century have enhanced the problems inherent in developing accurate appraisals of the world in its international aspect.”²²⁴ This is witnessed in the humanitarian case studies researched for this study - the Liberian civil war (1989), Operation Restore Hope (1992 Somalia), Opération Turquoise (1994 Rwanda) and the conflict in Côte d’Ivoire (2002-present).²²⁵ Knowledge about both domestic and international norms and institutions, as well as the interrelationships between them, becomes critical to fully understanding the ways in which law both restrains and empowers states in their pursuit of national and international security.

²²⁴ Charles A. McClelland and Robert Pfaltzgraff, ‘Scholarship and Policy’ (August 2016) *Encyclopaedia Britannica* <https://www.britannica.com/topic/international-relations/Scholarship-and-policy> accessed 13 January 2018. See also Slaughter 2011.

²²⁵ Thesis Section Four, chapters eight through eleven.

This is of importance when considering that the traditional understanding of international law is based upon the function of the law as implied and not upon its interpretative nature.²²⁶ Criticisms of this concept include its rigidity and a focus on informed consent²²⁷ without acceptance of, or allowance for, interpretation, despite the fact that the mere enactment of a law by a political institution does not imply the acceptance of all such laws as legitimate and binding.²²⁸

When analysing international law as specified in the United Nations Charter, one can see that humanitarian intervention is not compatible with the Charter. This is witnessed in the rules on use of force and human rights. Humanitarian intervention is also not considered a rule (norm) of international law.²²⁹ (This gives credence to Chesterman's argument that humanitarian intervention, as a legal concept, is incoherent.)²³⁰ Consequently, there are no established internal mechanisms to provide for its effectiveness. Therefore as this thesis suggests, it is necessary to provide a framework identifying when the rules of humanitarian intervention become effective within foreign

²²⁶ The concept of legal positivism is set out in Chapter One.

²²⁷ General agreement that allows something to happen only after all the relevant facts are disclosed (TheLaw.com Law Dictionary; Black's Law Dictionary 2nd Ed. 2008).

²²⁸ Slaughter, Tulumello & Wood 1998:367-397. See also Simma & Paulus April 1999; "Symposium on method in International Law: The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View"; Abbot 1999:361-378.

²²⁹ Ian Hurd 'Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World' (2011) 25, No. 3 *Ethics & International Affairs* 219; Martha Finnemore 'Constructing Norms of Humanitarian Intervention' in Peter J. Katzenstein (ed) *The Culture of National Security: Norms and Identity in World Politics* Columbia Press 1996; Edward Luck *Limitations and Responsibilities* 2011; Edward Newman 'Humanitarian Intervention, Legality and Legitimacy' (2002) 6 No. 4 *International Journal of Human Rights* 102; Abiew 1999.

²³⁰ Chesterman 2001.

policy due to international law's dependent characteristics.²³¹ A framework would need to address how humanitarian intervention is recognised within the state's legal structure. Is it through legislative enactments or judicial decisions? Are new rules concerning humanitarian intervention interwoven with the old rules of human rights and sovereignty or do they extend beyond the traditional concepts of human rights and sovereignty?

In addition the theoretical framework must also consider that since the use of military force in humanitarian intervention or non-intervention is fundamentally a domestic decision, the relevance of perceived threats outside a state's sovereignty must also be taken into account. How does a state interpret a rule of international law that involves the simultaneous application of laws on the protection of human rights and the use of force for human rights protection given that the United Nations Charter itself highlights the confusion between sovereignty, independence and equality of states on the one hand, and the need for the international community to ensure peace and security on the other?²³²

Finding a balance is of significance since both the right to sovereignty and the ensuring of peace and security require a discussion of legality for intervention. Thus, the relationship between international law and foreign policy requires construction of the rules of international law

²³¹ Tomuschat 1999.

²³² Ramesh Thakur discusses this tension in 'No more Rwandas': intervention, sovereignty and the responsibility to protect' (2004) *Humanitarian Exchange Magazine*; see also Besson 2004:39-41.

within the domestic legal-policy process. Donnelly has explained that this relationship is based upon a domestic,

legal system that tells us at any given point in time which rights are considered most fundamental in society. Even if human rights are thought to be inalienable...rights still have to be identified by human beings and codified into the domestic legal system.²³³

Consequently since many human rights treaties do not contain enforcement mechanisms,²³⁴ the interpretation of a principle of international law into the domestic legal system is required so that international law becomes binding on domestic authorities.²³⁵ In some circumstances however a state may not be willing to obey a principle of international law which inevitably becomes a source of tension during decision-making.

Tension between International Law and Foreign Policy

The tension between international law and foreign policy has promoted debate about whether international law is irrelevant to state policy or whether it actually influences it.²³⁶ Noortmann has noted that previous

²³³ Donnelly 1999:71-102. "By itself, the legal norm, whether customary or conventional, has no meaning; it takes its meaning, as well as its legal value, from the order producing it" Jouannet 2009:128.

²³⁴ David Armstrong and Theo Farrell, *International Law and International Relations* Cambridge University Press 2012:271.

²³⁵ This gives further credence to Tomuschat's theory of dependence, to which this researcher agrees (Tomuschat 1999).

²³⁶ Dworkin 2013:2. "Nothing has really changed the old grounds for challenge remain" (Ibid.). Walt argues that this tension can be narrowed if the academic community places greater value on policy-relevant theoretical work (Stephen M. Walt 'The Relationship Between Theory and Policy in International Relations' (2005) 8 *Annual Review of Political Science* 23. Francis Boyle argues that "the process of international politics is accounted for by the concept of power and international law is regarded as having no intrinsic significance" (Francis A. Boyle 'The Irrelevance of International Law: the Schism between International Law and International Politics (1985) 10 *Calif. West international Law Journal* 198, 206-7).

research has not settled the debate.²³⁷ Onuf writes: “[l]aw cannot cause action in any meaningful way; instead, law operates so as to provide reasons for action. It does not have a single defining characteristic”²³⁸ Abbott argues the “theorization of the relationship of international law to the broader political system of which it is a sub-system should be of relevance to scholars of international law and international relations.”²³⁹

Responding to these arguments Charlotte Ku maintains “a continuation of the gap that exists between those who focus on international law and those who focus on international relations continue to present a barrier to research.”²⁴⁰ Brunnée and Toope discuss how some international lawyers express concern about interdisciplinary dialogue with international relations. “These lawyers articulate the need for legal autonomy. For them, law’s goal is to shape and judge behavior, and not primarily to explain or predict behavior, which they take to be the purpose of IR [international relations] theorizing. It is feared that to draw the two fields together will inevitably result in a watering down of law’s ability to provide an external critique of social interaction.”²⁴¹ In contrast David Forsythe argues that: “too often public international law

²³⁷ “[T]hese projects failed or lost momentum of over time for different reasons” Noortmann 2012:6). Hurd 2009; see also, Wiessner & Willard (1999:316-334) “Policy oriented Jurisprudence and Human Rights Abuses in Internal Conflict: Toward a World Public Order of Human Dignity”; and Baubérot (2000) *Histoire de la laïcité française* (normative models in French governance).

²³⁸ Onuf 2013:111.

²³⁹ Kenneth W. Abbott ‘Symposium on Method in International Law: International Relations Theory, International Law and the Regime Governing Atrocities in Internal Conflicts’ (1999) American Society of International Law 338. Shirley Scott also discusses this in ‘Theorizing the Relationship between International Law and International Politics’ (1984) 5 *European Journal of International Law*, 313.

²⁴⁰ Ku 2010; also see Westra 2017.

²⁴¹ Brunnée and Toope 2012:2.

has been taught as if it were just another black-letter law course whose subject matter was about as straightforward as the federal income tax code.... Unless we reestablish the integral connection between the study of international law and the practice of international relations.”²⁴²

Despite this apparent tension Coleman and Hurd have argued that the interpretation of international law through a state’s domestic legal environment is frequently overlooked.²⁴³ It is therefore often necessary to discover a state’s position on international law by examining its domestic legislation and legal sources.²⁴⁴ Consequentially, international law differs from domestic law in ways that affect, but do not eliminate, its ability to influence state behaviour.²⁴⁵

The primary distinction between domestic law and international law is that international law often lacks an enforcement mechanism. Legal systems based upon tradition and cultural differences, discussed previously in this chapter, also make the interpretation and application of international law difficult. As a consequence one could question whether the rules of international law can be considered applicable law if they are

²⁴² Forsythe 1990:1.

²⁴³ Coleman 2007:22; Hurd 1999:388.

²⁴⁴ Shaw 2008.

²⁴⁵ “Mere lists of treaties are not the equivalent of data, per se. Other sources of international law, such as general principles or *jus cogens*, are similarly difficult to translate into variable data.” Charlotte Ku and Paul F. Diehl (eds) *International Law: Classic and Contemporary Readings, Third Edition* Lynne Rienner Publishers 2009 :8. See also Noortmann 2012:6; Kratochwil 1989, 2014; Onuf 2013; Brunnée & Toope 2012.

not translated into the domestic legal framework where there is greater potential for application and obligation.²⁴⁶

This is not to argue that contemporary writings fail to engage in criticism of foreign policy and international law. Quite to the contrary; criticism is not hard to find, particularly when directed at the misuse of international law or the failure of the international system to solve problems associated with the compliance and implementation of international law. However, these criticisms are generally concerned with refining accepted norms and standards and in this sense the criticism appears to be restricted to arguments about particular theories and beliefs, instead of investigating the ways in which decisions are actually legitimated and presented for authorisation at the state level.²⁴⁷

This observation remains relevant. Not only do arguments regarding the applicability of international law underlie legal debates on the cases under review in this study - Operation Restore Hope, Opération Turquoise and the ongoing conflict in Côte d'Ivoire – but the prolonged violence in Syria has raised new debate on this same problem.²⁴⁸ Issues concerning the international community's responsibility to intervene for the protection of civilians caught in regional crisis are raised.

²⁴⁶ Coleman 2007:22; Hurd 1999:388.

²⁴⁷ David Chandler *From Kosovo to Kabul: Human Rights and International Intervention* Pluto 2002; Math Noortmann 2012. For a critical approach on this position see David Chandler 'The Security–Development Nexus and the Rise of 'Anti-Foreign Policy' (2007) 10, no. 4 *Journal of International relations and Development* 362:86.

²⁴⁸ Arguments are ongoing about the legality and legitimacy for a use of force action in Syria, see for instance Peter Certo 'Military Intervention in Syria Is the Problem, Not the Solution' (2015) *Foreign Policy in Focus*; Chris Wilson 'Credibility at Stake: Syria and the Kosovo Model' (2013) *The Mantle* [online].

Specifically legal issues relating to decisions to intervene with the use of military force for civilian protection as well as concerns on non-intervention, issues which are discussed further in section three.

Brunnée and Toope were correct to note that whilst both Onuf and Kratochwil attempted to “posit an important role for international law in helping to construct the identities of sovereign states and in shaping their behaviour. Yet they failed to allow the full scope for the influence of law because they were constrained by their implicit adoption of the framework of positivism.”²⁴⁹ Subsequently Hans Morgenthau raised the question in *Politics Among Nations* as to whether it is possible to assume that international law imposes legal restraints upon individual nations while at the same time national sovereignty precludes these same nations from being subject to legal restraints remains of relevance today.²⁵⁰

Similarly, the argument as to whether international law is really law and the argument about how to clarify the relationship between an individual state’s foreign policy and international law, are not unrelated. The view that international law is not law dates back to the nineteenth century English jurist John Austin, who argued in *An Essay on Sovereignty* “that international law is merely a set of moral principles with no binding force.”²⁵¹ As we later came to know the question of what international

²⁴⁹ Brunnée and Toope 2012:10-11.

²⁵⁰ Hans J. Morgenthau and Kenneth W. Thompson *Politics Among Nations* (Sixth Edition) Alfred A. Knopf 1985, 43, 211; see also supra note at 229-230.

²⁵¹ Wilfred E. Rumble *The Province of Jurisprudence Determined* Athlone Press 1995, vii-xxiv. Wilfred E. Rumble *The Province of Jurisprudence Determined* Athlone Press

law is, would be superseded with the emergence of the Danish Institute Report (1999) and the Responsibility to Protect Doctrine (2001). The question of the conceptualisation of international law at the domestic level and its effectiveness however remained unanswered.

It stands to reason that clarification of the relationship between an individual state's foreign policy and international law can be witnessed in the allocation of power in the normative legal aspects of the decision-making process to interpret and apply the principles of international law. This will reinforce the relationship used to govern state behaviour particularly when an external source defines a state's sense of what constitutes legitimate action within a state's established normative system of rules.²⁵²

Indeed, given that domestic uncertainty concerning authority will leave the decision-makers unclear about where to focus their strategies on decisions to use force or non-intervention, international law will play a role in regulating the interaction between the state and its position in the international system, through the state's domestic legal framework. (This was particularly true in the early 1990s when no formal legal or political guidelines/mechanisms for humanitarian intervention decisions

1995, vii-xxiv. It should be noted that Austin's legal influence remains of relevance due to his analytical approach in legal theory (Ibid).

²⁵² Ian Hurd 1999. See also, Claire Cutler 'Critical Reflections on the Westphalian assumptions of international law and organization: a crisis of legitimacy' (2001) 27 *Review of International Studies* 133-150; Rodney Bruce Hall and Thomas J. Biersteker *The Emergence of Private Authority in Global Governance* Cambridge University Press 2000. As well as Dworkin 1986, 2009; Kratochwil 2000; Andrei Marmor 2005, 117; Raz 1996; and Tomuschat 1999 at Thesis footnote 38

were in place.)²⁵³ Noortmann has argued, correctly, that the implications of international law upon foreign policy should encourage dialogue between the two disciplines, especially in the areas of legitimate humanitarian needs and security concerns.²⁵⁴ Therefore it is necessary to reconcile different institutional processes – law and politics - that interact simultaneously in foreign policy.

Rethinking State Power: Neoclassical Realism & Legal Study

Donnelly has stated that traditional concepts of realism in international relations theory attempt to reduce law to politics.²⁵⁵ Tunkin agrees, stating that “the realist approach to foreign policy means that one must achieve one’s objectives in foreign policy by any means, without taking into account principles of law.”²⁵⁶ The problem is that law and politics involve different institutional processes that interact simultaneously in foreign policy. Thus as Forsythe asserts “it is wrong to think of either international or domestic law as a set of technical rules divorced from

²⁵³ Thesis footnote 5.

²⁵⁴ Noortmann 2012:6 (As Noortmann suggests, earlier work on ‘dual agendas’ has grown static).

²⁵⁵ ‘Realism assumes that the character of foreign policy can be ascertained only through the examination of its political behaviour and of the foreseeable consequences of this behaviour.’ Jack Donnelly *Realism and International Relations* Cambridge University Press 2000. ‘Realist approaches tend to devalue the role of norms in international society, leaving little space for the operation of law. Liberal theories are open to norms, but tend to project an homogenous normativity that undermines the valued diversity of international society. Constructivist scholars reject the dominant assumption of contemporary international relations theory that the interests of states and other actors are formed prior to social interaction’ (Ian Hurd *Globalization and International Relations Theory* Oxford University Press 1999); Kratochwil 1989; Brunnée & Toope 2012; Slaughter 2011.

²⁵⁶ Grigorii, I. Tunkin, *The Influence of International Law on Foreign Policy* Harvard University Press 1984, 284.

politics. Since both international law and domestic law results from a political process.”²⁵⁷

Unlike other theories of international relations,²⁵⁸ the thesis argues that neoclassical realism, with its emphasis on the domestic level of analysis,²⁵⁹ can clarify international law’s effectiveness on foreign policy through the state’s domestic legal institutions. As the empirical studies of this research determine, neoclassical realism provides a viable enforcement mechanism for states to determine how domestic-level legal-political processes are capable of assisting systemic information through foreign policy. In that state law will mediate the tension between the rules of international law and foreign policy and as such will fuse with international law to effect policy within a particular state. The implications of which are significant concerning issues of authority and the legality of enforcement for foreign policy decisions about human rights and the protection of those rights.²⁶⁰

²⁵⁷ David Forsythe *The Politics of International Law: U.S. Foreign Policy Reconsidered* Lynne Rienner Publishers, Inc. 1990:2-3.

²⁵⁸ This argument is set-out in Chapter Five of this thesis.

²⁵⁹ Rose 1998; Lobell, Ripsman and Taliaferro 2009; Schweller 2003.

²⁶⁰ Legal scholars have drawn from areas of political science and international relations: to examine interdisciplinary, the content of legal rules and institutions and why they are effective. Michael Goodhart ‘Human Rights and the Politics of Contestation’ in *Human Rights at the Crossroads* Oxford University Press 2014; Patrick Jackson *The Conduct of Inquiry in International Relations: The Philosophy of Science and its Implications for the Study of World Politics*. Routledge 2011; Fred Grünfeld, ‘International Law and International Relations: Norm and reality or viceversa’ (2011) *Amsterdam Law Forum*, [online]; Joseph Raz *Between Authority and Interpretation: On the Theory of Law and Practical Reason* Oxford University Press 2009; Ian Hurd ‘Legitimacy and Authority in International Politics’ (1999) 53, 2 in *International Organisations* 379; Robert Powell ‘Anarchy in International Relations Theory: The Neorealist-Neoliberal Debate’ 1994 48(2) *International Organization* 313; Anne-Marie Slaughter, Andre S. Tulumello, Stephan Wood ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’ (1998) 92 *American Journal of International Law* 367; and Abbott 1999.

As this thesis suggests, the effectiveness of how international law determines the course of a state's foreign policy rests upon the complex and sometimes contradictory nature of international legal principles and of a state's legal framework. This framework consists of the domestic institutions and norms clearly present within individual states. This includes sources of law, the way law is created within an individual state, and how state law should function. This legal familiarity will therefore have a central influence on behaviour subject to the rule of law, resulting in different perspectives regarding the course of action to be taken in similar situations. Consequently, the conduct of states will differ from the expectations of the international system due to limitations inherent to any state's legal institution and which cannot be overcome at the international level.²⁶¹ These differences are based upon the interpretation of facts, the values ascribed to each state's legal position, and on the substantive limits that legislatures have enacted or on which courts have ruled at the domestic level.²⁶²

Therefore the traditional concepts of realism, which tend to leave little space for the operation of law,²⁶³ are wrong to reduce law to politics. Because legal institutions are deemed as normative power structures rather than descriptive power,²⁶⁴ that normative power structure may

²⁶¹ Reus-Smit 2004:40.

²⁶² Germain 2003:195; Summers and Taruffo 1991; Friedman 1975:223; Slaughter, Tulumello & Wood 1998:367-397. See also Simma & Paulus April 1999; Abbott 1999; and Friedrich Kratochwil *The Status of Law in World Society: Meditations on the Role and Rule of Law in Foreign Policy* Cambridge University Press 2014.

²⁶³ Donnelly 2000; Brown and Ainley 2009.

²⁶⁴ Nye defines descriptive power as soft power. Joseph Nye *Soft Power: The Means to Success in World Politics* Public Affairs Institute, U.S. Library of Congress 2004.

transform domestic knowledge and preferences in ways that demonstrate how the interpretation of international legal principles are regulated differently by different states. This is further established by Kratochwil's argument above that the international legal process is inextricably linked to politics.²⁶⁵ This will be demonstrated by the comparative research into the foreign policies of France and the United States contained in section four. When conditioned with issues of legality surrounding humanitarian intervention, the power of international law's effectiveness is tied to the state's domestic use of familiar internal legal resources that individual decision-makers will unquestionably understand as correct and valid. These legal resources are measurable and predictable and have the ability to control policy outcomes.

Christopher Hill extends this argument to the policy-making arena by arguing that policy is made within context of a 'policy paradigm'.²⁶⁶ As summarised by Hay, "Hall asserts that, policymakers customarily work within a framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be addressing ... this framework is embedded in the very terminology

²⁶⁵ Kratochwil 1989.

²⁶⁶ Hay 2002:197.

through which decision makers communicate about their work, and it is influential ... this interpretive framework [is] a policy paradigm.”²⁶⁷

Applying neoclassical realism²⁶⁸ to legal study can therefore clarify expectations regarding the normative aims of international law and the state’s interpretive process involving the simultaneous application of laws on the use of force and attention to human rights. The fundamental tenets of neoclassical realism are that foreign policy is an outcome of both international structure and domestic factors, as well as of a complex interaction between the two.²⁶⁹ As Rose explains, “neoclassical realism argues that the scope and ambition of a country’s foreign policy is driven first and foremost by the country’s relative material power. Yet it contends that the impact of power capabilities on foreign policy is indirect and complex, because systemic pressures must be translated through intervening unit-level variables such as decision-makers’ perceptions and state structure.”²⁷⁰

Adding further support to this perspective Jeffrey Taliaferro writes:

That the strength of “domestic power structures act to condition the ability and willingness of policy leaders to provide ‘strategic leadership’ on behalf of convergence with systemic power shifts,”²⁷¹ “such as how power is

²⁶⁷ Hill 2003:279. “A policy paradigm is internalised by decision-makers and policy experts, and acts as a source of guidance for conducting and evaluating policies, which defines the range of legitimate methods available. This in turn helps maintain continuity and produce change” (Hay 2002:197).

²⁶⁸ “Neoclassical realism is more of a methodological approach than a distinct variant of realist theory. Scholars of neoclassical realism are interested in theorizing, with a focus on domestic or systemic variables” Rose 1998.

²⁶⁹ Rose 1998; Lobell, Ripsman and Taliaferro 2009; Schweller 2006.

²⁷⁰ Ibid., Lobell, Ripsman and Taliaferro 2009; Taliaferro 2006:7.

²⁷¹ Taliaferro 2006:486.

perceived and how states mobilize the internal resources necessary to pursue their foreign or security policies.²⁷²

Consequently, “power cannot be solely calculated on the basis of material factors.”²⁷³

In this way, neoclassical realism provides a viable enforcement mechanism for states to determine how domestic level processes are capable of assisting systemic information (in this study, humanitarian principles) through foreign policy. This specific underlying mechanism, which positions how the interpretative process is established and operates between humanitarian concerns and foreign policy, constitutes the essential differences in how the role and purpose of international law will be decided by both France and the United States. This is because neoclassical realism concentrates not only on the content of the legal rules but also considers how those legal rules are strategically applied to justify and substantiate humanitarian concerns in foreign policy.²⁷⁴

For example, both France and the United States will attempt to recognise and interpret the international legal principles involving humanitarian decisions through their own internal legal resources. International legal principles, such as human rights and sovereignty, are recognised under customary international law, and accepted in both U.S. and French law. The human rights of another country however are not considered legally binding per se when considered outside the U.S. context.

²⁷² Zakaria 1997:9-33.

²⁷³ Ibid.:297.

²⁷⁴ Rose 1998; Lobell, Ripsman and Taliaferro 2009; Schweller 2006.

In France, as mentioned previously, Africa is included in French law (Article 72 of the 1958 French Constitution) and will be an important consideration when considering issues of legality surrounding humanitarian intervention decisions. An example of this and central to the thesis argument is the Rwanda crisis, which will present a legal conflict for France between human rights and its ties to Africa. In France's interpretation of human rights protection, French laws and its bi-lateral agreements and security commitments towards the Habyarimana regime effectively weakened the influence of humanitarian concerns, despite the genocidal nature of the civil war.

In adapting neoclassical realism, with its emphasis on the domestic level of analysis, state power can no longer be limited to material factors because legal institutions also exert power. Thus, as a point of analysis, this research stresses that the allocation of power in the decision-making process can be witnessed in the power of a state's legal framework. This framework consists of a state's legal sources and the state's strategic use of legal reasoning and legal argument. A legal strategy associated with the capabilities of states to interpret, apply and execute the principles of international law with state law, which in turn justifies and controls foreign policy outcomes. As noted above, this is based on the understanding that the function of any legislative or court system is the right and power to interpret and apply law as prescribed. Consequently,

to claim that law lacks power illustrates a shallow understanding of legal concepts at both the state and international level.

This thesis' approach therefore considers a variation in the traditional meaning of power and rule structures inherent in realist theory, which has traditionally measured power in terms of military capabilities or economic strength. The originality behind this approach is that it recognises that state power is not limited to its material factors but also draws upon its internal resources, such as sources of law (which reinforce a state's normative power structures) and the strategic capabilities involved in the interpretation and application of the principles of international law.

While neoclassical realism has been used only for theories of foreign policy thus far, if this approach is taken seriously, the author anticipates that new forms of analysis will emerge that will reconstruct the concepts of law (in the decision-making environment) to focus less on individual state preferences in foreign policy and more on how domestic legal institutions shape and redirect those preferences and may exert power in the international environment.

Summary

This section has presented the legal framework underpinning the thesis. For the benefit of this study, this section has advanced the importance of interpretation and how the use of interpretation carries the ability to affect and/or justify legal change. This section has also stressed that the

reasons for differences in interpretation lie within the differences in the legal systems of France and the United States.²⁷⁵ These differences determine how domestic law shapes foreign policy toward international law. Ronald Dworkin's views on the interpretative nature of law and argument on the role of sources in law supports this position.²⁷⁶ Christian Tomuschat's assertions regarding international law's dependent characteristics would indicate that states utilize this dependency to construct international law effectively within foreign policy.²⁷⁷

Following the thesis' position on the importance of interpretation, Chapter Three argued that despite changes in the international environment existing studies have only begun to evaluate critically the influence of international law in a state's domestic legal structures when explaining foreign policy.

Neoclassical realism was also introduced to address the relationship between law and foreign policy.²⁷⁸ In its adaption of neoclassical realism, the research has considered a variation in the traditional meaning of power and rule structures inherent in realist theory, wherein power has traditionally been measured in terms of military capabilities,²⁷⁹ and considers that the allocation of power in the decision-making process can be witnessed in the power of a state's legal framework. As a point of analysis, this research stresses that law, as a

²⁷⁵ David René 1972; Claire M. Germain 2003; Lawrence M. Friedman 1984; Mary Ann Glendon, et al. 1994.

²⁷⁶ Dworkin 2009 and 2013.

²⁷⁷ Tomuschat 1999.

²⁷⁸ Rose 1998.

²⁷⁹ Waltz 1998; Walt 1997.

state's internal resource, is important in the domestic decision-making environment because legal institutions exert power.²⁸⁰ This approach will inform an understanding of how state and international law interact simultaneously in foreign policy to effect humanitarian concerns.

In the often-quoted terms of Robert Cox, “theory is always for someone and for some purpose,”²⁸¹ and the theories outlined in the methodology that follows are no different. The next section outlines the theoretical components of comparative foreign policy analysis and neoclassical realism, which underpin the argument of this thesis; which is then followed by a survey of the methodology.

²⁸⁰ Donnelly 1999.

²⁸¹ Robert Cox ‘Social Forces, States and World Orders: Beyond International Relations Theory’ (1981) 10 (2) *Millennium*:126, 128.

***Section Two:
The Theoretical Framework and
Methodology***

***Comparative Foreign Policy Analysis
and Neoclassical Realism
or “You Can’t Have Your Parsimony
and Eat it Too.”***

Hudson, Valerie M., 2007:28

II. Constructing a Methodology

This section has two specific aims: first, to identify the rationale for the use of comparative foreign analysis, and second, to argue for an approach using neoclassical realism, the components of the theoretical framework underpinning this thesis. Chapter Four identifies the rationale for the use of comparative foreign policy analysis, which allows the thesis to explain the various differentials that led the United States and France to adopt specific positions and approaches on intervention as official policy. Chapter Five briefly critiques four mainstream theories of international relations that the author considers dominate the foreign policies of France and the United States: realism, liberalism, English School and constructivism. Additional consideration is given to constructivism in view of its traditional understanding of anarchy as put forward by such theorists as Alexander Wendt in international relations which this research challenges.

The previous section dealt with the legal framework, this section takes the subject further, offering a methodological focus on legal study and foreign policy analysis. Which shows how decisions to intervene or not to intervene are, in part, determined by a state's interpretation of a rule of international law in shaping the structure of authority and legitimacy within the decision-making process. This leads to Chapter Six, the methodological process, which includes the formulation of the research questions and hypotheses that this thesis will test in the form of comparative studies between France and the United States.

4. Comparative Foreign Policy Analysis

To explain the methodology used in this research, it is necessary to outline the approaches and theories which guide the choice of method to answer the set research questions. The questions raised in this research fall within a subfield of international relations known as comparative foreign policy analysis.²⁸² Comparative foreign policy is substantiated by empirical evidence and links the study of domestic politics - the conduct and practice of relations between different states – to the international system.²⁸³

The origins of comparative foreign policy date back to the 1950's.²⁸⁴

The approach is built upon three definitive positions: first, Snyder, Bruck

²⁸² The literature on the relationship between international relations theory, foreign policy and foreign policy analysis is extensive. For instance: “theory remains essential for diagnosing events, explaining their causes, prescribing responses, and evaluating the impact of different policies (Walt 2005); “foreign policy is guided by theoretical ideas” (Walt 2005:23). “Virtually every attempt to explain international relations involves an explanation of foreign policy” (Steven Smith ‘Foreign Policy Analysis and International Relations’ (1987) 16(2) *Millennium: Journal of International Studies* 345:348). International relations theories concentrate on the impact of the international system on foreign policy (Kaarbo, Lantis and Beasley 2002:3); as well as Valerie M. Hudson *Foreign Policy Analysis: Classic and Contemporary Theory* Rowman & Littlefield Publishers, Inc. 2007; Richard C. Snyder, H.W. Bruck and Burton Sapin ‘Foreign policy decision making revisited’ Palgrave 2002; Laura Neack, Jeanne Hey and Patrick Haney (eds.) *Foreign policy analysis* Prentice Hall 1995; Fearon 1998 (amongst others).

²⁸³ As evidenced by Lantis and Beasley 2017:4; Beasley 2013; Treacher 2013; Hill 2003; Fearon 1998; Chilcote 1994; Rosenau 1966, 1980; Smith 1987. Moreover, the study of comparative foreign policy has expanded and benefited from many other disciplines as it grew as a field of research Hudson 2007 and Valerie M. Hudson, ‘Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations’ (March 2005) 1, Issue 1 *Foreign Policy Analysis* 1.

²⁸⁴ Originators include: Richard C. Snyder, H.W. Bruck and Burton Sapin *Decision-Making as an Approach to the Study of International Politics* Foreign Policy Analysis Project Series No. 3) Princeton University Press 1954; Richard C. Snyder, H.W. Bruck and Burton Sapin. *Foreign policy decision making revisited* Palgrave 2002; Margaret and Harold Sprout *Man-Milieu Relationship Hypotheses in the Context of International Politics* Princeton Center for International Studies, Research Monography No. 30, 1956; Roseenau 1966 and Rosenau, James N. ‘Comparative Foreign Policy: One-Time Fad, Realized Fantasy and Normal Field’ in *International Events and the Comparative Study of Foreign Policy* University of South Carolina Press (1975).

and Sapin suggest research needs to be based on observations *below* the state level, of those actually involved.²⁸⁵ Second, Hudson states that it is necessary to observe the international and operational environment or context as it is *perceived* and *interpreted* by decision-makers.²⁸⁶ Third, the study of foreign policy is rendered more methodologically precise by analysing events “in terms of *independent, intervening, and dependent* variables that are operational and manipulable.”²⁸⁷ These approaches afforded an explanation as to how to understand foreign policy as a process beyond systemic oriented explanations or outputs.²⁸⁸ In, as this thesis suggests, a mechanism is provided to “situate events and to interpret problems, as a way to mobilize and guide social action, and to suggest possible resolutions to current plights.”²⁸⁹ Consequently, by focusing on analysis at the domestic level, comparative foreign policy analysis is able to explain the actions and decisions not of systems, but of individual laws and decision-makers, as it systematically attempts to contrast and compare foreign policy decisions.²⁹⁰

²⁸⁵ Snyder, Bruck and Sapin 1954:53; Rosenau 1966; James Dickovick and Jonathan Eastwood *Comparative Politics: Integrating Theories, Methods, and Cases, Second Edition* Oxford University Press 2015.

²⁸⁶ The significance of this was the idea that individual decision makers were at the centre of understanding foreign policy (Hudson 2007:23); Sprout 1956; See also, Robert Jervis *Perception and Misperception in International Politics* Princeton University Press 1976; Cottam (1977) *Foreign Policy Motivation: A General Theory and a Case Study*.

²⁸⁷ Rosenau 1980:119.

²⁸⁸ Snyder, et al.2002; Sprout & Sprout 1957; Rosenau 1966; Chilcote 1994.

²⁸⁹ James Rosenau ‘The External Environment as a Variable in Foreign Policy Analysis’ in *The Scientific Study of Foreign Policy* Nichols Publishing 1980:15. See also James N. Rosenau *Turbulence in World Politics: A Theory of Change and Continuity* Princeton University Press 1990.

²⁹⁰ Foreign policy analysis is “first and foremost interested in explaining how and why . . . decisions came about” (Marijke Breuning, *Foreign Policy Analysis: A Comparative Introduction* Springer 2007:164); Valerie M. Hudson and Cristopher S. Vore ‘Foreign Policy Analysis: Yesterday, Today and Tomorrow’ (1995) 39 *Mershon International Studies Review* 209. Juliet Kaarbo, Jonathan S. Lantis and Ryan Beasley ‘The Analysis

If one considers that recent threats to international stability and security are about the inability of states to govern effectively within their own region.²⁹¹ Contributed to by choices about international security made by state decision-makers, raising questions concerning legitimacy;²⁹² how do states, or more specifically, the decision-makers and institutions that act on a state's behalf, perceive and assess international threats? Especially since the structure of the state "contributes to cohesion and fragmentation, and it can affect the way one state responds to a threat as compared to another responding to the same threat."²⁹³ An explanation is needed to identify points of interaction between different legal regimes and the interpretive process during policy formation. Such an explanation can provide foundations upon which to understand domestic and international phenomena during decision-making.²⁹⁴

Despite the historical connections between France and the United States in Africa, their responses to the same external threats have been quite

of Contemporary Comparative Foreign Policies' in Beasley, Kaarbo, Lantis, & Snarr (Eds.) *Contemporary Comparative Foreign Policy* CQ Press 2002:1.

²⁹¹ Aidan Hehir 'NATO's 'Humanitarian Intervention' in Kosovo: Legal Precedent or Aberration?' (2009) 8 *Journal of Human Rights* 245; Alex Bellamy and Paul D. Williams *Protecting Civilians in Uncivil Wars*, Working Paper Working Paper No. Program on the Protection of Civilians, Asia-Pacific Centre for the Responsibility to Protect (2009).

²⁹² In recent years state action in relation to wars and state interventions raise crucial questions of legality (Scott 1994:314); Slaughter, Tulumello and Wood 1998:367; Chris Abbott 'Humanitarian Intervention Rights and Responsibilities: The Dilemma of Humanitarian Intervention' (2005) 7, No. 1 *Global Dialogue* 2; Kenneth Abbott 'Modern International Relations Theory; A Prospectus for International Lawyers' 14 *Yale J. Int'l L.* (1989) 338; Tesón 2006.

²⁹³ Randall L. Schweller *Unanswered Threats: A Neoclassical Realist Theory of Underbalancing* Princeton University Press 2006:13.

²⁹⁴ Kuhn 1996; Hay 2001; Slaughter 2011; Slaughter, Tulumello and Wood 1998; Turkin 1984.

different. Comparative study of the foreign policies of France and the United States will provide a legal-political analysis of foreign policy outcomes on humanitarian interventions based on the interactions of comparable states, each with its own existing domestic legal framework, when faced with the same systemic pressures.

As is known, domestic level variables will constrain or facilitate the ability of all states to respond to international crises, yet theories about how international and domestic law interact within foreign policy do not always recognise the complexities between international legal principles and different states' legal frameworks.²⁹⁵ The explanation of which Rosenau argues requires a theory that integrates system-level and unit-level variables between systemic pressures and foreign policy.²⁹⁶ Neoclassical realism with its emphasis on the domestic level of analysis is able to integrate international legal principles on foreign policy outcomes because the domestic legal framework positions how the interpretative process operates between international law and foreign policy.²⁹⁷ Comparative foreign policy's premise as to the necessity of analysing an occurrence in terms of independent, intervening, and dependent variables is, therefore, compatible with neoclassical realism's

²⁹⁵ Forsythe 1990; Slaughter, Tulumello and Wood 1998; Tesón 2006; Kaarbo 2015.

²⁹⁶ Rosenau 1980; Rose 1998:51; Taliaferro agrees with this position, he suggests "state power—the relative ability of the state to extract and mobilize resources from domestic society—shapes the types of internal balancing strategies that countries are likely to pursue. Explaining this requires a theory that integrates systemic-level and unit-level variables" (Jeffrey W. Taliaferro, 'State Building for Future Wars: Neoclassical Realism and the Resource-Extractive State' (July–September 2006) 15, no. 3 *Security Studies* 464.

²⁹⁷ Thesis Chapter 3 p:77-84 (Neoclassical Realism & Legal Study); Thesis Chapter 1, p:34, 40-42, 44, 46 (Why Interpretation Matters).

basic theoretical structure: distribution of power in the international system (independent/systemic variable), domestic perception and/or domestic institutions (intervening variable), foreign policy decision (dependent variable).”²⁹⁸ As such this theoretical framework becomes a viable research tool for this thesis and will inform an understanding of how essential differences in a state’s legal framework, its sources of law and strategic use of interpretation, affect how France and the United States shape the structure of authority and legitimacy to effect humanitarian concerns through the examination of unit level factors during decision making.²⁹⁹ Which, as noted previously, something other theoretical approaches are unable to do.³⁰⁰

By focusing on the domestic level as an intervening variable, neoclassical realism is better suited to this study because the research is able to illustrate how comparative foreign policy analysis can explain the actions and decisions of individual decision-makers, not systems, as the analysis methodically attempts to contrast and compare the legal aspects of foreign policy decisions. For instance, comparative foreign policy analysis can explain the various differential factors that led to the United States and France’s adoption of their specific positions and approaches on intervention as official policy in Africa in the 1990s. This clearly concurs with Jessup’s assertion that “it is not the state which acts: it is always specific sets of decision-makers and state officials located in

²⁹⁸ Thesis p:10, footnote 26; Rose 1998:5:1; Rosenau 1966.

²⁹⁹ Thesis Chapter 3 p:82-83; Chapter 2, p:55, 57-64 (How Legal Behaviour Shapes Foreign Policy Toward International Law).

³⁰⁰ Thesis footnote 40.

specific parts of the state system;”³⁰¹ and Hill’s, “foreign policy can never be abstracted from the domestic context out of which it springs.”³⁰² So a domestic level focus is integral to understanding how states can agree that a particular international legal rule exists but then understand the rights or obligations of that rule in different ways.

This comparative analysis also brings in its wake an analytical problem. As Marijke Breuning asserts “leaders [often] make analogies on the basis of superficial commonalities while ignoring significant differences between situations.”³⁰³ These differences become evident in the empirical chapters which present evidence relative to the inconsistencies underlying the foreign policy decisions of the United States and France concerning Rwanda. Particularly as it was without hesitation that both states intervened in Somalia in 1992 (United States)³⁰⁴ and were later to intervene in Côte d’Ivoire in 2002 (France).³⁰⁵ Stephen Van Evera has argued “conflict is made much more likely by states’ frequent misperception of international conditions, their own capabilities, and the intentions of other states.”³⁰⁶ As the empirical chapters will illustrate, drawing correlations between different conflicts based upon previous

³⁰¹ Jessop 1990:367.

³⁰² Hill 2003:37.

³⁰³ Breuning 2007:16. “If different processes do indeed lead to similar concrete empirical behaviors the concept reflected by one such act could be different within different formulations” (Most & Starr 1984:402); Hudson 1995, 2007:5-6; Chollet and Goldgeier 2002.

³⁰⁴ Valerie J. Lofland ‘Somalia: US Intervention and Operation Restore Hope’ (2002) in *Case Studies in Policy Making, Naval War College*, 56.

³⁰⁵ *Jeune Afrique L’Intelligent*, n° 2322 du 10 au 16 juillet 2005; Alex Bellamy and Williams, Paul ‘The New Politics of Protection? Cote d’Ivoire, Libya and the Responsibility to Protect’ (2011) 82, no. 7 *International Affairs* 825.

³⁰⁶ Stephen Van Evera *Causes of War: Power and the Roots of Conflict* Cornell University Press 1999:11.

situations can prove to be problematic in that it may cause a negative influence and/or exacerbate the situation. Particularly when domestic level processes are not considered for humanitarian concerns when producing foreign policy, which neoclassical realism is able to do.

Establishing Legal Precedent in Foreign Policy?

This complexity also draws attention to insufficient legal analysis and clarification of legal issues at both the state and international levels when considering that states will need to integrate international legal rules to construct policy within an existing domestic legal framework.³⁰⁷ From within this same context, it also becomes questionable whether the norm of humanitarian intervention, if established at the international level, will indeed establish precedent at the state level, and vice versa. This research ascertains that this was evident in Somalia when international humanitarian principles were publicly expressed by the United States and Western leaders to justify intervention, and to a certain extent limited the principle of sovereignty, when invoking Chapter 7 of the United Nations Charter.³⁰⁸ At the state level this precedent is obscured because analysis

³⁰⁷ “For too long, the importance of international law for the study of international relations and foreign policy has been undervalued” (Forsythe 1990 xiii). Foreign policy decision-making takes place in an increasingly legalized environment (Westra 2017:1). “Most scholars who study foreign policy and international relations systematically or scientifically seem to think of social laws and theories as being either true or false (Most & Starr 1984:386). In “International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship” Slaughter, Tulumello and Wood, “identify three ways that lawyers are using materials and insights from IR [international relations] theory to diagnose substantive problems and frame better legal solutions; to explain the structure or function of particular international legal rules or institutions; reconceptualize or reframe particular institutions or international law generally” (1998:369).

³⁰⁸ U.N. Security Council Resolution 794 (S.C. res 794, 47 U.N. SCOR at 63, U.N. Doc. S/RES/794 (1992)).

is situated only at the international level.³⁰⁹ The analysis of “Security Council Resolutions are the common legal instrument ... to make a recommendation or statement, recall a fact, express an opinion, or undertake any other matter of substance. The importance of Security Council resolutions, combined with their infrequent invocation and extensive vocabulary, demonstrates a necessity for creating a hierarchical classification system internationally.”³¹⁰ This is obvious in the comparison of Operation Provide Comfort³¹¹ which provided humanitarian and security assistance to the Kurds in Northern Iraq, with Operation Restore Hope in Somalia. Therefore, prior readings narrowly analyse the constraints of domestic law and ignore significant legal differences between situations.

Comparative Foreign Policy Analysis and Neoclassical Realism

Incorporating the comparative approach of foreign policy analysis into neoclassical realism allows the research to make parallel contrasts and subsequently determine how French decision-makers perceived France and its place in Africa in contrast to the United States, and how perceptions varied from Mitterrand to Chirac and G.W. Bush to Clinton.

³⁰⁹ See for instance, Justin S. Gruenberg ‘An Analysis of United Nations Security Council Resolutions: Are All Countries Treated Equally?’ (2000) *41 Case W. Res. J. Int’l L.513*; Paul Lewis ‘Mission to Somalia; First U.N. Goal Is Security; Political Outlook Is Murky’ (December 4, 1992) *US Edition, World The New York Times @ 2017 The New York Times Company* (Library of Congress Archives); Wheeler 2000, *Saving Strangers*; Danesh Sarooshi *The United Nations and the development of collective security: the delegation by the UN Security Council of its chapter VII powers* Oxford University Press 2000.

³¹⁰ Gruenberg 2000:481-482.

³¹¹ United Nations Security Council (UNSC) Resolution 688; Gordon W. Rudd, *Humanitarian Intervention, Assisting the Iraqi Kurds in Operation Provide Comfort*. D.C.: Library of Congress 1991.

This theoretical approach is able to focus on the domestic decision-making environment between the international system and foreign policy, which will then identify and analyse how humanitarian pressures are translated through each state's legal structures and its decision-makers.³¹² Defining the “range of legitimate methods available in the international system,”³¹³ which ultimately affects the course of action a state may be willing to take in humanitarian intervention decisions.³¹⁴

This incorporation of approaches further allows the thesis to explain the variances between individual decision-makers' perceptions in relation to perceived security threats, and how adequate legal analysis at the state level aided humanitarian intervention decisions.³¹⁵ As a result we understand a state's legal behaviour – in particular how principles of international law interact with domestic law to regulate the interaction between the state and its position in the international system. Thus it become possible to understand why France abandoned its non-intervention policy in Côte d'Ivoire, thereby lending support to the foreign policy shaped by President Chirac's government,³¹⁶ while the

³¹² As Valerie Hudson states: ‘The single most important contribution of [foreign policy analysis] to [international relations] theory is to identify the point of theoretical intersection between the primary determinants of state behaviour: material and conceptual factors. The point of intersection is not the state, it is decisionmakers.’ (2005:3).

³¹³ Hay 2002:197; Schweller 2003.

³¹⁴ This adds value to the current literature at both a theoretical and an empirical level, since research has been biased toward processes at the international system level (see Thesis footnote 54).

³¹⁵ Hudson 2005:3; Hudson 2007; Lantis and Beasley 2017:4.

³¹⁶ Lansana Gberie and Prosper Addo (August 2004) *Challenges of Peace Implementation in Côte d'Ivoire, Report on an Expert Workshop by KAIPTC and ZIF*, Monograph 105.; UNSC S/RES/1464 2003; Security Council Press Release SC/7657 (04/02/2003); Daniel Chirot ‘The Debacle in Côte d'Ivoire’ (April 2006) 17, Issue 2 *Journal of Democracy* 68; Documentation Française: Côte d'Ivoire :

United States felt that Africa posed no direct threat to either the United States or world security.³¹⁷

Clearly then, for this research, applying comparative foreign policy analysis and neoclassical realism to the stated research question(s) is helpful in establishing differences between France and the United States regarding:

- Casual factors relevant to the interpretation and application of international law and its principles;³¹⁸
- the study of differences in legal systems – including the domestic legal institutions and sources which protect those beliefs;³¹⁹ and
- when addressing the complex relationship between different legal regimes and the process of legal interpretation in foreign policy, to distinguish the effectiveness of international law in shaping the structure of authority and legitimacy within the decision-making process.³²⁰

5. Old School vs. New School: Neoclassical Realism

Beavis notes that “international Relations theory entails the development of conceptual frameworks and theories to facilitate the understanding and explanation of events and phenomena in world politics, as well as the

http://www.ladocumentationfrancaise.fr/dossier_actualite/crise_cote_divoire/forces_presence.shtml accessed 13 July 2014; Bagayoko-Penone 2009:171-173; Treacher 2013.

³¹⁷ US Security Issues in Africa. Hearing before the Subcommittee on African Affairs of the Committee on Foreign Relations, United States Senate, Washington DC, Thursday May 7, 1992 (Library of Congress, Washington, DC).

³¹⁸ Rosenau 1980; Rose 1998.

³¹⁹ Reus-Smit 2004; Friedman 1975; David 1972; Germain 2003; Gordon and Osakwe 1994.

³²⁰ Rose 1998; Hay 2002; Schweller 2003; Clark 2001; Lobell, Ripsman and Taliaferro 2009; Hudson 2007; Lantis and Beasley 2017; Slaughter, Tulumello and Wood 1998.

analysis and informing of associated policies and practices.”³²¹ While theories may start from the same assumption (anarchy for example), each theory will reach different conclusions with different explanations.³²² Conversely there are different beliefs with regard to the use of force for the protection of human rights. For instance, the use of force is generally explained based upon traditional realist assumptions.³²³ According to Donnelly, the study of realism has traditionally focused on power in international relations theory and in the traditional Westphalian system where the state is seen as having the most power based upon the legal concept of sovereignty.³²⁴ Critics of realism such as Elman acknowledge the basic components of realism but find that in several respects the theory lacks adequate precision and rigor.³²⁵ Keohane proposes that realist thoughts are contradictory between power struggles and aspects of cooperation.³²⁶ While Snidal puts forward “power plays a key role in

³²¹ Beavis 2017 online. Theory remains essential for diagnosing events, explaining their causes, prescribing responses, and evaluating the impact of different foreign policies (Walt 2005).

³²² Stephen M. Walt, ‘International relations: One world, many theories’ (Spring 1998) 110 *Foreign Policy: Special Edition: Frontiers of Knowledge* 29:30. See also Stephen M. Walt ‘The Relationship Between Theory and Policy in International Relations’ (2005) 8 *Annual Review of Political Science* 23; David Marsh and Gerry Stoker *Theory and Methods in Political Science* MacMillan Press, Ltd. 1995; Robert Kaplan ‘The Coming Anarchy’ (February 1994) *Atlantic Monthly* 44; Walter Carlsnaes ‘Foreign Policy’ in Walter Carlsnaes, Thomas Risse and Beth A. Simmons (eds) *Handbook of International Relations 2nd edition* Sage Publications 2012; Martin Griffiths (editor) *Encyclopaedia of International Relations and Global Politics* Routledge 2007; Brown & Ainley 2009.

³²³ Realism presumes sovereign states hold a legitimate monopoly over the use of force in the international system (Jack Snyder ‘One World, Rival Theories’ (Nov/Dec 2004) 145 *Foreign Policy* 52:55).

³²⁴ Donnelly 2000; Morgenthau 1973; Carr 2001; Baehr and Castermans-Holleman *The Role of Human Rights in Foreign Policy, Third Edition* Palgrave MacMillan 2004:18-22.

³²⁵ Mariam F. Elman ‘Democracy and International Conflict: An Evaluation of the Democratic Peace Proposition’ (October 1996) 40, Supplement 2 *Mershon International Studies Review*.

³²⁶ Robert Keohane *Humanitarian Intervention: Ethical, Legal and Political Dilemmas* Cambridge University Press 2003.

realism but the correlation between power and political output is not compelling, calling for an enrichment of other variables in the analysis of the international system.”³²⁷ Therefore if one considers that most conflicts since the early 1990s, and before, have been fought within states rather than between states, traditional assumptions of realism may not always be applicable because the assumed obligations under realism may affect the protection of civilians in conflict situations.

As post-Cold War conflicts are re-identified, so too must approaches to international relations theory within foreign policy.³²⁸ Re-identification creates a period in which competing approaches of international relations theories emerge. Space is therefore created by the failure of the old theoretical pattern and replaced with new theoretical patterns.³²⁹ As Benton and Craib argue, the result is the identification of new research and analysis which leads to original and innovative policies,³³⁰ (thus providing a basis for this thesis’ theoretical approach). Consequently, competing perspectives in international relations theories portray important aspects of a state’s foreign policy in world politics.³³¹ Questions within French and United States foreign policy regarding the

³²⁷ Duncan Snidal ‘The Game Theory of International Politics’ (1985) 38, 1 *World Politics* 25:32.

³²⁸ Abbott 1999; Edward H. Carr *The Twenty Years' Crisis, 1919-1939* Perennial Press 1939, 2001; Thomas Gale (ed.) *International Encyclopedia of International Relations* Random Scholastic Press 2008; Carlsnaes, Risse and Simmons 2012; Reus-Smit and Snidal 2010.

³²⁹ Benton and Craib 2001:58-63; Hay 2001:196-197; Kuhn 1996; Hill 2003.

³³⁰ Ibid. The focus of international relations is situated in circumstances at certain periods of time. The result is the identification of new research and analysis which leads to a ‘quest for innovative policies,’ Carr 2001; Kaarbo 2015; Gale 2008; Holsti, 1996; Carlsnaes, et al. 2012; Reus-Smit & Snidal 2010; Sprout & Sprout 1957; Rosenau 1966.

³³¹ Hill 2003; Hudson 2002.

use of force – “its legitimacy, its utility, its desirability”,³³² beg other questions about what legal safeguards or factors motivate foreign policy behaviour. For instance, how was foreign policy reflected within sub-Saharan Africa, especially since, as noted before, effective humanitarian intervention was made unlikely for geopolitical reasons in that region between 1989 and 2002.³³³

One objective of this research is to identify differences in the legal decision process between states concerning security threats involving intervention through the domestic legal framework.³³⁴ As previously mentioned, the United States does not consider human rights outside of the U.S. context as legally binding.³³⁵ In France however Africa is included in French law³³⁶ and will be an important consideration when considering issues of human rights. For this reason, a set of explanatory foreign policy rationales are developed for each conflict analysis, by applying neoclassical realism to the decision-making process of both states. These rationales will establish how France and the United States responded to each humanitarian threat, to determine whether certain behaviour patterns regarding a state’s decision-makers, its legal institutions and the different outcomes they produce fit within this theory approach better than different theoretical approaches when explaining

³³² Charles William Maynes ‘Relearning Intervention’ (Spring 1995) 68 *Foreign Policy*.

³³³ John F. Clark ‘Realism, Neo-Realism and Africa’s International Relations in the Post Cold War Era’ in *Africa’s Challenge to International Relations Theory* Kevin C. Dunn and Timothy M. Shaw (eds) Palgrave 2001:91.

³³⁴ One of the three inter-related research questions in this thesis: “Do states interpret international law differently to support their foreign policy decisions to use force or not intervene for humanitarian reasons?” (Thesis:18).

³³⁵ Jouanne 2009; Larsen 2007; Murphy 2004.

³³⁶ Article 72 of the French constitution (1958).

“the intentions, statements, and actions of an actor [state] ... when directed towards the external world.”³³⁷

As Rose contends by way of neo-classical realism, “the impact of power capabilities on foreign policy is indirect and complex, because systemic pressures must be translated through intervening unit-level variables such as decision-makers' perceptions and state structure.”³³⁸ It is in following this premise and drawing on its complexity, that this research adopts an understanding of Taliaferro's assertion that “power cannot be solely calculated on the basis of material factors;”³³⁹ Zakaria's neoclassical realism position that “other elements of power must be considered, such as how states mobilize the internal resources necessary to pursue their foreign or security policies,”³⁴⁰ which is corroborated by Schweller who argues “states with more effective internal structures are going to be able to facilitate the extraction and conversion of resources more usefully than others.”³⁴¹ To be more precise, in adopting these positions, this research asserts that the allocation of power can be witnessed in the power of states to interpret, apply and argue principles associated with legal rules. In allocating space to the interpretative process through the state's unit-level variables, neoclassical realism identifies the way a state manages systemic information (humanitarian

³³⁷ Neack 2003:26; Carlsnaes 2002:335; Hudson 2007.

³³⁸ Lobell, Ripsman and Taliaferro 2009:7; Rose 1998.

³³⁹ Lobell, Ripsman and Taliaferro 2009:297.

³⁴⁰ Zakaria 1997:9-33.

³⁴¹ Schweller 2006:159-200.

concerns) and how systemic information influences the state's ability to interpret societal demands and respond to them effectively.

In light of this assertion, “the most trenchant criticism of neoclassical realism has come from Jeffrey Legro and Andrew Moravcsik³⁴² They argue that the central problem with neoclassical realism is that it presents “a direct challenge to the theoretical distinctiveness of contemporary realism, one with immediate and significant practical implications. ... [in that] the theoretical core of the realist approach has been undermined by its own defenders, in particular neoclassical realists.”³⁴³ Further critique towards neoclassical realism comes from within the school of Realism itself.³⁴⁴ In particular Adam Quinn’s *Kenneth Waltz, Adam Smith and the Limits of Science: Hard choices for neoclassical realism* situates itself as a critique to this thesis.³⁴⁵ Quinn argues, “in seeking to identify law-like patterns of state behaviour arising from the varied features of states themselves, NCR [neoclassical realism] appears to breach the outer limits of what Kenneth Waltz, the founding father of structural International Relations theory, thought tolerable in a theory of international politics.”³⁴⁶

³⁴² Brian Rathbun ‘A Rose by Any Other Name: Neoclassical Realism as the Logical and Necessary Extension of Structural Realism’ 2008 17 *Security Studies* 294:298.

³⁴³ Jeffrey Legro and Andrew Moravcsik ‘Is Anybody Still a Realist’ (Fall 1999) 24, 2 *International Security* 6-8.

³⁴⁴ See for instance: Quinn 2013:159-182; Caverley 2013:145-166; Carlsnaes, Risse & Simmons 2012; Clark 2012; Waltz 2008; Jervis 1998.

³⁴⁵ Quinn 2013.

³⁴⁶ Quinn 2013:159, 177-78. The theory referred to is generally known as neorealism.

However Quinn's article does not differentiate between "law-like patterns" which are conceived at the international level and the state/domestic level. Nor does his argument account for the importance of variables at the domestic level. Instead it insinuates that "law-like patterns" are merely ideational factors which this thesis rejects given that the research stresses that law, as a state's internal resource, is important in the domestic decision-making environment which thereby shapes foreign policy.³⁴⁷ Moreover, neoclassical realism does not seek to explain systemic outcomes³⁴⁸ as Waltz does by omitting unit-level variables,³⁴⁹ only how foreign policy is derived,³⁵⁰ which is what my thesis does. Consequently, Quinn's argument does not illustrate that he understands what law does in the interaction between different legal regimes, given that his argument does not recognise the practical legal requirements used to produce foreign policy.³⁵¹ In opposition to Quinn and Waltz, Friedrich Kratochwil argues, "the particular style of legal reasoning that pertain to domestic systems cannot exist in international society."³⁵²

Neoclassical realism therefore provides a viable enforcement mechanism for states to determine how domestic-level legal-political processes are capable of assisting systemic information through foreign policy. As

³⁴⁷ Thesis:17.

³⁴⁸ Lobell, Ripsman and Taliaferro 2009; Rose 1998.

³⁴⁹ Rose 1998; Schweller 2006.

³⁵⁰ Waltz 1979, 1996.

³⁵¹ To reiterate the thesis position, "foreign policy decision-making takes place in an increasingly legalized environment" (Westra 2017:1); and Dickovick & Eastwood 2015; Most & Starr 1984:386; Slaughter, Tulumello and Wood 1998; Tunkin 1984.

³⁵² Kratochwil 1989:10-11.

such, this assertion will distinguish neoclassical realism from other international relations theories. The reason alternative theories of international relations are not appropriate for this research will be discussed in the following section. The significance of constructivism's traditional understanding of anarchy will also be analysed.³⁵³ The crux of the constructivist approach to anarchy is often summed up by Wendt's assertion that "anarchy is what states make of it;³⁵⁴ which suggests that anarchy is dependent upon the meanings we attach to anarchy at the systemic level³⁵⁵ and also assumes states act in a cohesive way in the international system.³⁵⁶ Yet, inasmuch as regional conflicts currently govern the international system, not conflict between states, and since constructivism is based upon norm construction at the international level, constructivism would be unable to meet the requirements of the humanitarian principles at issue within a state's decision-making process on its own in its analysis of foreign policy in the way that neoclassical realism is able to.³⁵⁷

³⁵³ "The most fundamental point to note is that each theory recognises the international system as being anarchic" (Seifudein Adem *Anarchy, Order and Power in World Politics* Ashgate 2002:19).

³⁵⁴ Wendt 1992:391. This differs from the realist approach "wherein anarchy is considered to lack a central government to enforce rules and protect states" (Joshua Goldstein and Jon Pevehouse *International Relations* (7th Ed) Pearson Longman 2006:73). This observation is also discussed in Slaughter 2011:22; Brunnée & Toope 2012; Grünfeld 2011; Brown and Ainley 2009.

³⁵⁵ Ted Hopf 'The Promise of Constructivism in International Relations Theory' (1998) 23: 1 *International Security* 171:174.

³⁵⁶ Pauline Rouillon *Questioning Alexander Wendt's critique of IR theory* London School of Economics Publishing 2016.

³⁵⁷ Rose 1998; Lobell, Ripsman and Taliaferro 2009; Schweller 2006; and Hay 2002:197.

The Schools of International Relations Theory

This section will identify why alternative theories of international relations are not compatible with the aims of this research, and in doing so justify neoclassical realism's compatibility with comparative foreign policy analysis to add value to the current literature. Theories of international relations can be divided into positivist/ rationalist and post-positivist/ reflectivist.³⁵⁸ As discussed in Chapter Two, in the positivist conception, power inequalities are rooted in material reality. Hence there is objective reality and perception – *real* facts and *perceived* facts – and the analyst may compare the two. In the post-positivist sense, perceived facts and real facts are one and the same – the ideational is privileged over the material.³⁵⁹ General criticisms centre on the nature of the international system and its effect on patterns of international outcomes such as war and peace or distribution of power.³⁶⁰ With each respective theory critiquing each other. The most predominant challenges in this regard are posed by post-positivist's theorists and include studies examining the role of psychological factors in international relations.³⁶¹ Stein notes that some of these psychological factors include groupthink,

³⁵⁸ Brown & Ainley 2009; Carlsnaes, Risse and Simmons 2012; Reus-Smit and Snidal 2010; Walt 2005.

³⁵⁹ Brown 2009:1-17.

³⁶⁰ Marsh 1995; Wendt 1992; Walt 1997; Carr 2001; Cholle and Goldgeier 2002; Schweller 2006; Griffiths 2007; Brown & Ainley 2009; Jackson 2011, Beavis 2017 online, (amongst others).

³⁶¹ See for instance, Karl Popper's *Conjectures and Refutations: The Growth of Scientific Knowledge* Routledge Classics 1963; and/or Steven Bernstein, Richard Lebow, Janice Gross Stein, Steven Weber 'God gave physics the easy problems: Adapting Social Science to an Unpredictable World' (2000) 6, Issue 1 *European Journal Of International Relations* 43.

where policymakers tend to make decisions based on “(mis)perceptions and analogies, or both.”³⁶²

However while due consideration by the author of thesis was given to the various theoretical concepts, it is submitted here that four theoretical positions dominate the foreign policies of France and the United States: the realist, the liberal, the constructivist and the English School perspectives.³⁶³ The following section briefly reviews and critiques these four schools to establish that these theories do not provide a viable enforcement mechanism to assist systemic information through foreign policy based on their levels of analysis.

Realism

Various divisions in the realism school highlight analytical controversies at the methodological level.³⁶⁴ By definition realism is a broad group of

³⁶² Stein (2002:246) Janice Stein ‘Psychological explanations of international conflict’ in Walter Carlsnaes Tim Risse and B.A. Simmons *Handbook of international relations* Sage Publications, Ltd. 2002; and Robert Jervis *Perception and Misperception in International Politics* Princeton University Press 1976.

³⁶³ Limitations of space have made it necessary to focus on the four mainstream theories of international relations that the author considers dominate the foreign policies of France and the United States (Snyder 2004, Slaughter 2011, Walt 1998; Doyle 1997). In this same regard, “[l]egal scholars have drawn from the four main schools of thought in the areas of political science and international relations: realism, liberalism, institutionalism and constructiveness approach, to examine through an interdisciplinary approach the content of legal rules and institutions, to explain why and how legal institutions came to be and why they are effective (Abbott 1999:365); also see Slaughter 2011; Grünfeld 2011. For specific insight on the “three great debates” in the field of international relations see Kalevi Holsti *The State, War, and the State of War* Harvard University Press 2006. For further discussion on international relation theories and approaches see footnote 307 above. For literature on contemporary international relations theories and its interface with political theory (i.e., Critical Approaches: Frankfurt School, Cosmopolitanism, Critical Realism and International Historical Sociology) see: Bhaskar 1987; Booth 2007; Brown, Nardin & Regger 2002; Bull 1996; Buzan 1991; Habermas 1996; Linklater 2008; Rengger 1999; Wight 2006.

³⁶⁴ Donnelly 2000; Kenneth Waltz *Realism and International Politics* Routledge Publishers 2008; Stephen M. Walt ‘The Progressive Power of Realism’ (1997) 91, no 4

theories which rests on the assumption that states pursue their own interests in an anarchic system. Realists assert that the character of the international system is its fundamentally anarchic nature.³⁶⁵ The “emphasis on anarchy and power leads them to a dim view of international law and international institutions.”³⁶⁶ Realists believe such facets of international politics merely reflect the balance of power . . . in an anarchic system with no hierarchical authority.³⁶⁷ Brunnée & Toope state, “realists believe law will inevitably be trumped by power and interest calculations.”³⁶⁸ Law can only be enforced through state power.³⁶⁹ This therefore renders international law at the systemic level non-binding on the domestic level of analysis. The realist perspective considers the international system primarily in terms of a struggle for power, state capabilities, alliances as balance-of-power strategies and the threat and use of force. Although realist theories disagree on the motives behind foreign policy behaviour, about the exact meaning of power and on how and to what extent politics is likely to influence policy.³⁷⁰ They do agree that the primary determinant lies within the systemic level for analysis on the impact of the international system on

American Political Science Review 933; Brown and Ainley 2009; amongst other sources.

³⁶⁵ Marsh 1995; Wendt 1992; Walt 1997; Carr 2001; Carlsnaes, et al 2002; Schweller 2006; Griffiths 2007; Brown & Ainley 2009; Jackson 2011, Beavis 2017 online.

³⁶⁶ Slaughter 2011:3 (quoting Mearsheimer 1994).

³⁶⁷ As Kenneth Waltz writes in *Man, the State, and War: A Theoretical Analysis*, “anarchy as a systemic condition imposes certain requirements on a foreign policy that pretends to be rational” (1959:201).

³⁶⁸ Brunnée & Toope 2012:3. “Classical realists such as Hans Morgenthau saw law as a means of addressing uncertainty in international relations” Ibid:3. See also Scott 1994:314; Abbott 1989:338.

³⁶⁹ Slaughter 2011:3; see also Slaughter, Tulumello & Wood 1998; Schweller 2006; Waltz 2008; Mearsheimer 1995; Donnelly 2002; Walt 1998, 2005.

³⁷⁰ Waltz 1957; Marsh 1995; Wendt 1992; Walt 1997; Carr 2001; Carlsnaes, et al 2002; Schweller 2006; Griffiths 2007; Brown & Ainley 2009; Jackson 2011, Beavis 2017 online.

the behaviour of states.³⁷¹ This is important because it means traditional realist theories are not able to provide a viable enforcement mechanism to assist systemic information through foreign policy.

Classical realism is primarily concerned with the sources and uses of national power in international politics and the problems that leaders encounter in conducting foreign policy.³⁷² In contrast, the focus of neorealism (or structural realism) is on explaining common patterns of international behaviour over time.³⁷³ The international system is seen as a structure acting on the state with individuals below state level acting as an agency on the state as a whole.³⁷⁴ While neorealism shares a focus on the international system with the English School,³⁷⁵ it differs in emphasising the endurance of conflict and how the protection of human rights would be procured, and as such is unable to provide clarity for the enforcement of international principles found in the domestic legal

³⁷¹ Ibid.

³⁷² Carr 1939, 2001. "Carr's 1939 study *The Twenty Years Crisis* is now seen as a classic statement of the realist position and is still referenced by leading 21st century realists on both sides of the Atlantic" (Chris Brown 'The development of international relations theory in the United Kingdom: traditions, contemporary perspectives and trajectories' (2009) 46 (1-2) *International Studies* 221:224); Booth 2007; Boucher 1998.

³⁷³ Waltz 1979; Kenneth Waltz 'International Politics Is Not Foreign Policy' (1996) 6 (1) *Security Studies* 54; Robert Powell 'Absolute and Relative Gains in International Relations Theory' in *Neorealism and Neoliberalism: the Contemporary Debate* Columbia University Press 1993; Rathbun 2008:294;

³⁷⁴ Waltz 1979:132-133. For a critique of Waltz's position see Adam R. Humphreys, 'Another Waltz? Methodological Rhetoric and Practice in Theory of International Politics' (December 2012) 26, No. 4 *International Relations* 389, who "argues that Waltz's neo-positivist rhetoric is at odds with the heuristic manner in which he draws on his theory and aims to elucidate the disfunction between Waltz's methodological rhetoric and practice" (Humphreys 389:391).

³⁷⁵ Robert Jackson and Georg Sørensen *Introduction to International Relations: Theories and Approaches* Oxford University Press 2003:167; Andrew Linklater *The English School of International Relations: A Contemporary Reassessment* Cambridge University Press 2006.

framework.³⁷⁶ As Waltz and Mearsheimer assert realism further divides into defensive realism (Waltz)³⁷⁷ and offensive realism (Mearsheimer)³⁷⁸ and neoclassical realism.

Rose contends that neoclassical positions itself as a realist alternative to other ways of theorising foreign policy.³⁷⁹ What distinguishes neoclassical realism from classical realism is that classical realism does not clearly distinguish between characteristics at the individual level, and the state and system levels. In contrast, the focus of neoclassical realism is on state level factors as crucial intervening variables between systemic forces and foreign policies, investigating how and under what conditions state-level factors matter.³⁸⁰ Thereby providing a viable enforcement mechanism to assist systemic information through foreign policy.

Schweller contends that neoclassical realism has sought to refine neorealism by adding domestic intervening variables between systemic incentives and a state's foreign policy decisions.³⁸¹ He makes clear

³⁷⁶ Alyiev, Huseyn 'Neo-Realism and Humanitarian Action: From Cold War to Our Days' (2011) *Journal of Humanitarian Assistance* [online journal]; Dale Copeland 'A Realist critique of the English School' (2003) 29, Issue 3 *Review of International Studies* 427; see also Waltz 1979; Mearsheimer 1994.

³⁷⁷ Waltz 1979; Gale 2008; Brown and Ainley 2009; Carlsnaes, Risse and Simmons 2012.

³⁷⁸ Both consist of the realist conception of anarchy and structure. However, they differ on what signals the system sends to states: John Mearsheimer 'Back to the Future: Instability in Europe after the Cold War' in Brown, Michael E. et al. (eds) *The Perils of Anarchy: Contemporary Realism and International Security* MIT Press 1995 and John Mearsheimer *The Tragedy of Great Power Politics* Norton 2001. See also, Rose, 1998:149; Donnelly 2002; Walt 1997.

³⁷⁹ Rose 1998.

³⁸⁰ Lobell, Ripsman and Taliaferro 2009.

³⁸¹ Schweller 2003.

however: “neoclassical realism should not be mistaken for neorealism which seeks to explain systemic outcomes rather than foreign policy.”³⁸² “Unlike neorealism, neoclassical realism is able to translate the way different factors combine to yield foreign policy.”³⁸³ Neorealism’s systemic explanation Schweller argues, does not take into account the interests and motivations of states, which are important intervening variables during decision making.³⁸⁴ Further arguing that “foreign policy decisions limited to systemic factors alone are bound to be inaccurate much of the time.”³⁸⁵ This clearly concurs with Hill who asserts ‘foreign policy can never be abstracted from the domestic context out of which it springs. Without domestic society and the state there would be no foreign policy.’³⁸⁶

Even Waltz acknowledges that “the international system does not dictate exactly *how* each state will respond within international parameters.”³⁸⁷ Waltz goes on to state: “one cannot infer the condition of international politics from the internal composition of states, nor can one arrive at an understanding of international politics by summing the foreign policies and the external behavior of states,” which differentiates neoclassical

³⁸² Schweller 2003:334. “Neoclassical realism explicitly incorporates both external and internal variables, updating and systematizing certain insights drawn from classical realist thought.” See also, Rose 1998:144-172; Taliaferro 2006:464-495; Lobell et al 2009; Kenneth Waltz ‘Structural Realism after the Cold War’ (2000) 5(1) *International Security* 5:13.

³⁸³ Rose 1998:153.

³⁸⁴ Schweller 2006; Rosenau 1966 also.

³⁸⁵ Rose 1998:152.

³⁸⁶ Hill 2003:37

³⁸⁷ Waltz 1979:69.

realism from neorealism.³⁸⁸ Indeed “neoclassical realism does not do so. It uses the internal characteristics of states as a guide only to national responses to international constraints.”³⁸⁹

It can therefore be interpreted by inference that neoclassical realism moves away from the rigidity of neorealism and its emphasis on the international level in its consideration of the importance of variables at the domestic level. Yet at the same time it acknowledges the top-down approach of neorealism in that neoclassical realism recognises that systemic pressures create an agenda of reference for decision-makers (humanitarian situations position international rules/norms within the domestic legal framework) to explain patterns of foreign policy,³⁹⁰ as this thesis puts forward. It is for these reasons it is advocated in this thesis that neoclassical realism can therefore assert that as a point of analysis domestic legal structures act as a connection or fuse between the international system and foreign policy.

Moreover, while neoclassical realism may share the assumptions of neorealism concerning the influence of power, neorealism cannot advise as to how effectively (or even how) ‘the units of a system (states) will respond to international pressures’ (humanitarian crises, human rights abuses) and the ‘possibilities of changes in power’³⁹¹ associated with the complexity, and sometimes contradictory nature, of international legal

³⁸⁸ Waltz 1979:64.

³⁸⁹ Lobell, Ripsman and Taliaferro 2009:19. “Waltz also notes that theories of foreign policy can and should include causal factors at the unit and systemic levels” (Waltz footnote 49:48).

³⁹⁰ Lobell, Ripsman and Taliaferro 2009.

³⁹¹ Waltz 1996:54-56; Waltz 1979:71-72.

principles and a state's legal framework. This was especially true for classical realism in the 1990s when, as John Clark writes, "it [classical realism] was silent on the subject of humanitarian situations in Africa."³⁹²

E.H. Carr recognised the importance of interpretation and in doing so created a way of looking at principles he disagreed with. He considered principles without power, empty rhetoric.³⁹³ Neoclassical realism recognises this principle and power dichotomy in its allowance of systemic factors in the domestic legal framework. Consequently, by authorising the importance of systemic variables, neoclassical realism allows for the consideration of systemic factors such as the distribution of capabilities (the legal capabilities of states to interpret, apply and execute the principles of international law) which form the permissive legal-political environment for foreign policy. In this way, international law will regulate the interaction between the international system and its position within the state.³⁹⁴ This will account for the effectiveness of international law in shaping the structure of authority and legitimacy within the decision-making process, in that state law will interact with international law and either influence or restrict the norms of acceptable international behaviour within foreign policy.

³⁹² Clark 2001:91.

³⁹³ Carr 2001.

³⁹⁴ Sinclair 2010; Slaughter, Tulumello and Wood 1998; Slaughter 2011; Schweller 2006.

Liberalism

To further ascertain why neoclassical realism is more suitable for this thesis, liberalism will be critiqued. Realism moves to liberalism when the belief that states have fixed and uniform preferences is removed.³⁹⁵ Unlike realism, which perceives nations as unitary players and focus on state capabilities, liberalism believes in state preference and permits plurality in state action.³⁹⁶ Liberalism contends that internal factors such as “political and economic ideology, national character, partisan politics and social structure will influence the external behaviour of a state.”³⁹⁷ As posited by Snyder this allows for the consideration of additional factors said to influence the nature of preferences, including culture and the political system,³⁹⁸ which liberal theorists believe explains state behaviour in foreign policy.³⁹⁹ According to Brown & Ainley the liberal perspective looks at the international system more in “terms of expanding cooperation and complex interdependence through trade, negotiations and international institutions, thus contending that state preferences, rather than state capabilities, are the primary determinant of state behaviour.”⁴⁰⁰ They theorise it is in the self-interest of states to cooperate with each other and that international institutions facilitate

³⁹⁵ Kaarbo, Lantis & Beasley 2002; Marsh 1995; Walt 1997; Carr 2001; Carlsnaes, et al 2002; Cholle & Goldgeier 2002; Griffiths 2007; Brown & Ainley 2009; Beavis 2017 [online].

³⁹⁶ Miroslav Nincic *Democracy And Foreign Policy: The Fallacy Of Political Realism* Columbia University Press 1992.

³⁹⁷ Ibid.; and Powell 1993. As proposed by constructivist theory the obligatory effect of legal norms is rooted in the legal system’s legitimacy as a social institution at the systemic level: Brunnée & Toope 2012:3; Rues-Smith 2004; Risse & Sikkink 1999.

³⁹⁸ Snyder 1996; Zakaria 1997; Schweller 1997, 2006; Lobell., Ripsman & Taliaferro 2009.

³⁹⁹ In the ideational liberal view foreign policy is an effort to realize these views domestically (Keohane & Nye 1997); Kaarbo, Lantis & Beasley 2002.

⁴⁰⁰ Brown & Ainley 2009:19-23.

cooperation among states by way of established rules since they explain state behaviour and state legitimacy at the systemic level.⁴⁰¹

However this contention can be criticised as it gives little attention to systemic constraints.⁴⁰² For example human rights, a principle of international law, lies in the ambiguity, not adherence to the liberal values and rights of liberalism.⁴⁰³ It also underestimates the importance of variables at the systemic level, such as humanitarian intervention or use of force, which would therefore undermine the legitimacy of a state's foreign policy and narrowly analyse the constraints of domestic law. As Kaplan has argued, because of course, when looking at systemic constraints, the question will arise as to whose interests are reflected within international institutions.⁴⁰⁴ As Slaughter writes: "liberal theories are often challenging because international law has few mechanisms for taking the nature of domestic preferences or regime-type into account. These theories [of liberalism] are most useful as sources of insight in designing international institutions, such as courts, that are intended to have an impact on domestic politics or to link up to domestic

⁴⁰¹ See for instance the democratic peace theory. The theory refers to the idea that democracies by nature do not go to war with each another. An important part of the theory is that liberal, democratic states share a common normative dedication to liberal ideals. Ibid.; Michael Doyle 'Kant, Liberal Legacies, and Foreign Affairs' (Summer 1983) 12, no.3 *Part I, Philosophy and Public Affairs* 335:338; Michael Doyle *Ways of War and Peace: Realism, Liberalism, and Socialism* Norton 1997:286-287; van Evera 1999.

⁴⁰² Jennifer Sterling-Folker 'Realist Environment, Liberal Process, and Domestic-Level Variables' (March 1997) 41, no. 1 *International Studies Quarterly* 7.

⁴⁰³ Doyle 1997.

⁴⁰⁴ Kaplan 1999; Keith Krause and Michael C. Williams 'Broadening the Agenda of Security Studies: Politics and Methods' (Oct.1996) 40, No. 2 *Mershon International Studies Review* 229.

institutions.”⁴⁰⁵ Liberals argue against this, maintaining that there are consequences for breaking international law such as economic sanctions and stalled trade relations, and that international organisations would therefore have a measurable impact on state policy in international relations.⁴⁰⁶ However these arguments are flawed as they fail to take into account the fact that the use of sanctions gives meaning to an anarchic environment given the liberal attempt to predict the state behaviour of another state through the use of sanctions.

Liberalism’s focus on cooperation between states also ignores significant legal differences between situations, as this thesis’ research illustrates and discusses in the empirical chapters. In contrast to liberalism, neoclassical realism does not see states as simply aggregating the demands of different societal interest groups; rather, decision-makers define the national interest and foreign policy based upon their assessment of relative power and other states’ intentions, but still remain subject to domestic constraints and consequently view policy responses as a product of state–society coordination.⁴⁰⁷ As suggested previously, “one cannot infer the condition of international politics from the internal composition of states ... and the external behavior of states.”⁴⁰⁸ This perspective gives meaning to resulting outcomes that affect another state and can be observed in the interactions of France and the United States

⁴⁰⁵ Slaughter 2011:14.

⁴⁰⁶ Slaughter 2014; Keohane and Nye 1997; Kaarbo, Lantis and Beasley 2002; Beavis 2017 [online].

⁴⁰⁷ Lobell, Ripsman and Taliaferro 2009:24-27; Keohane & Nye 1997.

⁴⁰⁸ Waltz 1979:64.

regarding their decisions whether to intervene with use of force concerning the protection of civilians caught in intra-state conflict or, to not intervene. In this same context Jennifer Sterling-Folker writes “anarchy does not dictate how states should arrange their domestic processes to achieve that end.”⁴⁰⁹ Consequently, this affects whether states respond to international crises in a timely manner and ... “domestic processes act as the final arbiter within the anarchic environment.”⁴¹⁰ Thus liberalism ability to provide a viable enforcement mechanism to assist systemic information through foreign policy is undermined in favour of its quest for cooperation between states at the systemic level.

The English School

The distinctive feature of the English School is its questioning of the state-centric framing in international relations.⁴¹¹ Bull highlights that “it [the English School] sees international relations as a system which has been established based on institutions and rules which function in an anarchic manner as between sovereign states to create an international order.”⁴¹² Wight puts forward that it overcomes anarchy through the idea of international society.⁴¹³ “That while the international system is anarchical, international law and international society should be

⁴⁰⁹ Sterling-Folker March 1997:7.

⁴¹⁰ Ibid.

⁴¹¹ Brown 2009:11; Bull 1977; Dunne 1998; Linklater 2006.

⁴¹² Bull 2000:77; Bull 1977; and Buzan 2004. Bull’s interaction with international law in the English School is used to demonstrate international laws place within an anarchical order and that international law is an anarchical legal system which functions as a non-coercive legal order (Bull 1977:140-141). See also Watson 1987,

⁴¹³ Martin Wight *The Systems of States* (ed. H. Bull) Leicester University Press 1977.

promoted though a social condition [diplomacy]”⁴¹⁴ with sufficient influence on each to form an ‘international society’.”⁴¹⁵ Theorist of the English School, such as Bull and Wight, maintain the international system functions in the absence of a central authority and therefore are able to demonstrate the role which international law plays as an institution of international order.⁴¹⁶ They assert this position allows for authority in establishing international organisations such as the United Nations, which promote an intergovernmental society.⁴¹⁷ Yet it is an authority established from the systemic level. It is contended herein that the perspective offers little insight to the domestic level of analysis and its implications, and would be unable to provide a viable enforcement mechanism to assist systemic information through foreign policy based on the English School’s systemic level of analysis.

Theorists of the English School are subdivided between pluralists such as Buzan and Jackson; and solidarists such as Dunne, with both in agreement that “international society is norm-governed; where they differ is over the nature of the norms in question, and the telos of international society.”⁴¹⁸ These theorists have focused particularly on

⁴¹⁴ Ibid.88: See Buzan 1999 as well.

⁴¹⁵ Bull 1997:13.

⁴¹⁶ Tim Dunne *Inventing International Society: A History of the English School* St Martin’s Press 1998; Tim Dunne and Nicholas Wheeler ‘Hedley Bull’s Pluralism of the Intellect and Solidarism of the Will’ (1996) (72) *International Affairs* 91; Andrew Linklater 2006.

⁴¹⁷ “Such an international society is made up of sovereign states, meaning that states are independent from outside subjects and have full and exclusive competence in internal affairs, including the shaping and implementation of foreign policy” (Bull 1977; Bull 1976:101-116).

⁴¹⁸ Brown 2009:48-52.

humanitarian intervention.⁴¹⁹ This has led to one of the principal tensions in the English School. Solidarists who tend to advocate humanitarian intervention (particularly human rights), and pluralists who place greater value on order and sovereignty and the maintenance of international society.⁴²⁰ Proponents of the English School such as Watson and Buzan maintain that one of the necessary conditions for the existence of an international society lies in the acceptance of common rules by all its participants, and that participants will also share the same fundamental opinions regarding the “nature of the system, its actors and their behaviour.”⁴²¹

Yet as Dale Copeland argues, the problem with the English School is that international society norms provide little restraining power on countries determined to seek conflict. Producing an inability to measure international society as a causal factor and provide a conditional framework under which the norms of an international society would affect state behaviour.⁴²² This is relevant to this research given that in the case of civil conflict whether international law could or would authorise use of force for humanitarian concerns can only be decided by the state concerned and issues that support or negate that decision.⁴²³ Given the position this thesis adopts, English School would be unable to provide clarity for the enforcement of international principles found in

⁴¹⁹ Brown 2000:231; Wheeler 1992; Wheeler 2000; Linklater 2006; Hurrell 2007.

⁴²⁰ Buzan (1999) outlines the argument in “*A Reconsideration of the English school: close or reconvene?*”. See also, Buzan 2004; Wheeler 1992; Dunne & Wheeler 1996; Linklater 2006; Brown 2000.

⁴²¹ Watson 1987:147-53; Buzan 1991.

⁴²² Copeland 2003:427-435.

⁴²³ This issue is discussed in the empirical study under Legal Analysis.

the domestic legal framework concerning legal-political challenges involved in the formation of foreign policy as well as the identification of applicable law; and more importantly the determination of a state's legal obligations. Nor would the English School recognise interpretation at the domestic level when there is the need to integrate different legal norms and policy within a state's existing legal framework.

As a result it would be impossible to determine differences or explain patterns of foreign policy. Especially since a state develops foreign policy with its own approaches to and understandings of the international environment, and would therefore look to the international system for different interpretations and methods to legitimate its foreign policy behaviour. Moreover, the English School perspective implies a narrow approach, an approach which does not allow for essential change, particularly legal change, in interests and norms in determining conduct *between* actors.⁴²⁴ Thus norm expansion would be inhibited since it does not place the domestic level of analysis within its state-centric framing in international relations the way neo-classical realism does.⁴²⁵ Such a narrow approach bears similarity to the rigidity of neorealism and its emphasis on the international level in its consideration of the importance of variables at the domestic level.

Once again this establishes, as set out in chapter one, that international legal principles are dependent upon the state's legal interpretative

⁴²⁴ Thesis:33 and 189.

⁴²⁵ Brown 2009:11; Bull 1977; Dunne 1998; Linklater 2006.

process and operates between humanitarian concerns and foreign policy as defined by neoclassical realism. Consequently, as this thesis argues the allocation of power in the decision-making process is witnessed within a state's domestic legal structures. This allocation of power supports the effectiveness (or ineffectiveness) of international law in foreign policy.

Constructivism

In establishing the effectiveness of international law at the domestic level, constructivism comes close to neoclassical realism. In that it takes on the subject of perception by stressing the ideas, norms and values that shape the discourse and identity in which the context of foreign policy is formed.⁴²⁶ Hudson suggests it is through this perception that materially similar states act divergently within the international system.⁴²⁷ The constructivist focus on social constructs at the system level will therefore explain why a certain course of action is chosen by a state over another course of action in a way that other theoretical approaches do not.⁴²⁸ It attempts to remedy a course of action with the concept of collective identity norms, which, from a constructivist's point of view both realism and liberalism fail to do. In this sense, constructivists dispute the realist notion that self-help and power politics are essential features of anarchy but rather that they are institutions effecting the process rather than

⁴²⁶ "Constructivism would thus agree that international relations are socially constructed and imbued with social values, norms and assumptions" (Fierke, Karin 'Constructivism' in Dunne, Kurki and Smith *International Relations Theories: Discipline and Diversity* Oxford University Press 2007:168).

⁴²⁷ Wendt 1999; Hudson 2007:10-14.

⁴²⁸ Sinclair 2010.

structure of international relations.⁴²⁹ Yet in this same regard, Robert Jervis contends that, “constructivism does not, by itself, tell us something about the processes at work in political life, it does not, by itself, tell us anything about the expected content of foreign policies or international relations.”⁴³⁰ Wendt concurs with Jervis, he argues that the constructivist approach does not imply any particular unit of analysis as fundamental in the study of international relations.⁴³¹ Subsequently constructivism does not allow for sufficient intervening variables in the formation of foreign policy given that authority is situated at the systemic level of analysis.

Constructivist theory operates at a different level from both neoclassical realism and comparative foreign policy analysis. Its focus is on the location of and interaction between states in the international system. Scharf describes the constructivist view of the state as simply a black box,⁴³² a “unitary and rational actor in the state system. State identities and interests are determined by the relational position in the international political system,”⁴³³ which drives foreign policy. Domestic actors and domestic processes are deemed plainly irrelevant to the study of

⁴²⁹ Wendt 1992. Ian Hurd ‘Constructivism’ (chapter 17) in Christian Reus-Smit and Duncan Snidal (eds.) *The Oxford Handbook of International Relations* Oxford University Press 2010.

⁴³⁰ Jervis 1998:976. For a further critique of Wendt’s work see Colin Wight ‘They Shoot Dead Horses Don’t They?: Locating Agency in the Agent-Structure Problematique’ (1999) 5 (1) *European Journal of International Relations* 109 and Steven Smith ‘Wendt’s World’ (2000) 26 *Review of International Studies* 151.

⁴³¹ Wendt 1959, 1979.

⁴³² Scharf 2010; David Forsythe said much the same regarding public international law (Forsythe 1990:1); Thesis:55.

⁴³³ Wendt 1999:196. Wendt suggests those wishing to challenge this conception of the state and the conclusions it leads to are simply mistaken and should ‘leave well enough alone’ (Wendt 1999:196-197). Wight 1999 and Smith 2000 critique this position.

international relations,⁴³⁴ and would therefore be unable to identify where humanitarian intervention and its interests interact with foreign policy formulation. By focusing on the state-level, decision makers are not included which problematically shifts the human aspects of foreign policy to the systemic-level.⁴³⁵ Thus producing a systematic failure (in this author's opinion) when applied to foreign policy analysis given constructivism inability to analyse both the role and interpretive process of international law at the domestic level during policy-making or the underpinning rationale of the decision-makers. In fact, constructivism excludes questions concerning how systemic imperatives will likely translate through the intervening variables of state power into foreign and/or security policies.⁴³⁶ As Kratochwil explains: "law in international society exists simply by virtue of its role in defining the game of international relations. It informs the respective decision makers about the nature of their interaction and determines who is an actor; setting the steps necessary to insure the validity of their official acts and assigns weight and priority to different claims."⁴³⁷ This supports this research, which is seeking identify points of interaction between different legal regimes and the interpretive role of law during foreign policy formation.

To further this point, Ann-Marie Slaughter writes: "constructivism notes that international bureaucracies may seek to pursue their own interests

⁴³⁴ Ibid.

⁴³⁵ Smith 2000:161-62; Katalin Sarvary 'No Place for Politics? Truth, Progress and the Neglected Role of Diplomacy in Wendt's theory of History' in *Constructivism and International Relations: Alexander Wendt and His Critics* (edited by) S. Guzzini and A. Leander Routledge 2006.

⁴³⁶ Wendt 1999; Jervis 1998:971-991,976.

⁴³⁷ Kratochwil 1989: 56.

(eg human rights protection) even against the wishes of the States that created them.”⁴³⁸ Because “international law is of its very nature norm-focused, it holds a fascination with norm creation, evolution and destruction that has proven to be the strongest bridging point between some international legal theorists and the constructivists.”⁴³⁹ As a result “constructivists [with a few exceptions] have assumed a concept of law that is largely hierarchical and authority based. For this reason, many constructivists still see law as a set of posited requirements, created through state institutions.”⁴⁴⁰ Yet, by focusing on the state level constructivism problematically moves decision making from the domestic environment to the systemic level. This produces inconsistency during decision making because international law will therefore become the dependent variable. Consequently there is little conceptualisation of unit level/intervening variables (domestic structures or legal institutions) necessary to establish foreign policy.⁴⁴¹

The impact of moving away from constructivism’s systemic theory is that it allows a neoclassical realist analysis of the state from the domestic level, as well as a legal analysis of how foreign policy is made. This distancing also rejects any obscure version of law as resting on merely

⁴³⁸ Slaughter 2011:20; Hurd 2010.

⁴³⁹ “In the 1990s Nicholas Onuf and Friedrich Kratochwil focused on international relations approach to international law. Each theorised a role for international law in helping to construct the identities of sovereign states and in shaping their behaviour. Yet they failed to allow full scope for the influence of law because they were constrained by their implicit adoption of the framework of positivism” (Sinclair 2010:1-7). See also Brunnée & Toope 2012:1; Reus-Smit 2004:106-130; Slaughter 2011.

⁴⁴⁰ Brunnée & Toope 2012:1-2. See also Risse & Sikkink 1999; Sinclair 2010.

⁴⁴¹ Wight 1999:125-129; Sarvary 2006:160-180.

ideational factors,⁴⁴² given that the thesis underlying approach recognises the strategic capabilities of a state's power to interpret, apply and execute the principles of international law. While proponents of constructivism argue that the strength of a legal rule is a function of its level of institutionalisation (within a state's constitutional, regulatory or judicial systems) precisely how domestically *fixed* international institutions become a part of decision-makers' beliefs and thereby affect the state's legal-political behaviour is underspecified.⁴⁴³ This under specification undermines the legal authority of a state, since as Coleman argues "a state carries with it the authority to impose fixed legal rules,"⁴⁴⁴ including those based upon the principles of human rights as discussed in section one of this research.⁴⁴⁵

This under specification cannot account for the different responses of France and the United States in the conflicts under study nor can it account for the extent to which states interpret international law as a means of constructing authority within foreign policy.⁴⁴⁶ As will be established in Section Four, whereas France and the United States may share a sense of identity in Africa based upon humanitarian reasoning (i.e. human rights) and thus cooperation, this does not account for the internal resources and interests within each state (the role of domestic

⁴⁴² Quinn 2013.

⁴⁴³ Thomas Risse and Kathryn Sikkink have explored in detail how international human rights norms evolve and socialize actors, particularly through internalization into the domestic sphere" (Risse & Sikkink 1999:1-38).

⁴⁴⁴ Coleman 2008:4-5.

⁴⁴⁵ Tomuschat 1999; Dworkin 2009; Dworkin 2013; Coleman 2008; Westra 2017; Forsythe 1990; Most and Starr 1984.

⁴⁴⁶ Coleman 2008.

law and causal factors) and clearly does not identify any particular common interests in sub-Saharan Africa. Similarly while constructivism is based upon norm construction at the international level, even Alexander Wendt realized “in most situations the best that can be expected is concentric circles of identification, where actors identify to varying degrees with others depending on who they are and what is at stake.”⁴⁴⁷ This is a significant admission on Wendt’s part, because although he assumes states act in a cohesive way in the international system,⁴⁴⁸ it highlights the fact that even the most systemic theories cannot do without the influence of the domestic framework during decision making.⁴⁴⁹ This is central to the thesis argument, in that the research attempts to understand the complexities associated with international legal principles and a state’s legal responsibilities when deliberating foreign policy. Consequently constructivism will be unable to identify where humanitarian intervention and its interests interact with domestic variables during foreign policy formulation because the state is located only within the systemic level.⁴⁵⁰

Challenging ‘anarchy is what states make of it’.⁴⁵¹

In moving away from constructivism, the thesis also aims to move beyond Alexander Wendt’s constructivism’s argument that *anarchy is*

⁴⁴⁷ Suganami 2002:26

⁴⁴⁸ Pauline Rouillon *Questioning Alexander Wendt’s critique of IR theory* London School of Economics Publishing 2016.

⁴⁴⁹ Hay 2002; Suganami 2002.

⁴⁵⁰ Brunnée & Toope 2012:3; Rues-Smith 2004; Risse & Sikkink 1999.

⁴⁵¹ Wendt 1992.

what states make of it,⁴⁵² which is a systems-level account of international relations. That is to say, while the international system is anarchical, for Wendt anarchy does not determine state behaviour. His argument is situated in the belief that because constructivism is based upon norms it can account for changes in the international system that other theories of international relations cannot.⁴⁵³

Although this author holds an appreciation for this work, the research stresses that it is necessary to consider that it is regional (intra-state) conflict and violence which currently dominate the international system, not conflict between states. Therefore the applicability of norm assumption [from the constructivist's point of view] at the international level would be unable to meet the requirements of the humanitarian principles at issue within a state's decision-making process on its own. Especially when humanitarian principles are generated for the protection of civilians caught within regional [intra-state] violence and the use of force will be generated from outside the state of conflict to constrain that same state's illegitimate violence.

As detailed above constructivism does not focus on the state as a domestic actor; the state is located only within the systemic level and as such is unable to identify specifics associated within regional (intra-state) conflict and violence. Thus the focus is on the location of and

⁴⁵² Wendt 1992:399-402.

⁴⁵³ Ibid.

interaction between states in the international system.⁴⁵⁴ Yet we know that the roles performed by systemic effects and the unit-level (domestic) factors in foreign policy decisions are considerably different and will cause different effects in the international system.⁴⁵⁵ And while as noted above, constructivism argues that the strength of a legal rule is a function of its level of institutionalization, precisely how the rule affects the state in decision-making is under specified because constructivism does not account for unit-level factors in its analysis of foreign policy in the way that neoclassical realism does; this is the theoretical contribution of this thesis.⁴⁵⁶ The research stresses that law, as a state's internal resource, is important in the domestic decision-making environment because legal institutions exert power.

This position is supported by Kratochwil's argument that Wendt's "interest in norms is not motivated by some empirical test of legal validity within IR [international relations], instead the treatment of norms suffers from a variety of epistemological shortcomings"⁴⁵⁷ These shortcomings Kratochwil explains are "rooted in the very definition of IR as the study of anarchy and its sharp distinction between the domestic and international order."⁴⁵⁸ Hidemi Suganami, offers much the same

⁴⁵⁴ Ibid; Risse and Sikkink 1999.

⁴⁵⁵ Dworkin 1977:81-130; Slaughter, Tulumello & Wood 1998; Coleman 2008.

⁴⁵⁶ As discussed earlier in this chapter, the result is the identification of new research and analysis which leads to original and innovative policies. Carr 2001; Kaarbo 2015, etc. This also identifies the third inter-related question of this thesis: "If international law is politically constructed within a state's foreign policy through unit-level/ intervening variables does international law attain political authority?"

⁴⁵⁷ Kratochwil 1989:1; see also Kratochwil 2000, 2014; as well as Onuf 2013; Sinclair 2010; Ku 2001.

⁴⁵⁸ Ibid.

critique. “Wendt’s story so far is a hypothetical one. He [Wendt] does not have in mind any particular historical period or case to explain his theory of anarchy.”⁴⁵⁹

Consequently, neoclassical realism’s ability to account for the effectiveness of international law in shaping the structure of authority and legitimacy within the decision-making process allows for structures of hierarchy otherwise absent in the international system. While it is a given that international law contributes to state obligations, specifically when there is a perceived threat to security or challenge to the stability of the international order, an analysis of how international law is constructed within foreign policy through the domestic structures and mechanisms of the policy process indicates that the effectiveness of international law may indeed regulate and strengthen the policy behaviour of states.⁴⁶⁰ As Ian Hurd argues, “an external source that defines an actor’s sense of what constitutes legitimate action must be considered a centre of authority, and is, for all intent and purposes governmental.”⁴⁶¹ While neoclassical realism recognises the inferences associated with hierarchy, in the realist tradition, its translation through unit-level intervening variables allows it to meet the requirements of

⁴⁵⁹ Suganami 2002:25. For a further critique of Wendt’s ‘anarchy is what states make of it’ see Suganami, Hidemi (2002) “On Wendt’s philosophy: a critique.” *Review of International Studies* 2002, 28, 23–37, wherein Suganami expounds upon and critiques Wendt’s ‘complex philosophical argumentation’ 2002:28, 23–27. See also Pauline Rouillon *Questioning Alexander Wendt’s critique of IR theory* 2016 (online) and Ole Waever ‘Waltz’s Theory of Theory’ (2009) 23 (2) *International Relations* 201.

⁴⁶⁰ Ian Hurd ‘Legitimacy and Authority in International Politics’ (Spring 1999) 53, 2 *International Organisations* 379.

⁴⁶¹ Hurd 1999:379–408, 401; see also, Cutler 2001; Hurd 2011:219–313; Hall and Biersteker 2000.

humanitarian principles through the foreign policy process. Thus, the action is given validity not by the state's compliance with international law, but rather by international law's ability to affect foreign policy by utilizing the state's domestic legal and political structures as a mechanism for international authority. It is this legitimating function that affects a shift in authority structures within the state. As emphasised in Chapter Three, state law will mediate the tension between the rules of international law and foreign policy which will fuse with international law to effect policy within a particular state or issue area. This includes the needs of humanitarian intervention within a constantly changing domestic and international environment.

By focusing on how domestic-level legal-political processes are capable of assisting systemic information through foreign policy neoclassical realism has established why alternative theories of international relations are not compatible with the aims of this research. This has been accomplished by critiquing realism, liberalism, English School and constructivism. Although realist theories disagree on the motives behind foreign policy behaviour,⁴⁶² they do agree that the primary determinant lies within the systemic level for analysis on the impact of the international system on the behaviour of states.⁴⁶³ This is important because it means traditional realist theories are not able to provide a viable enforcement mechanism to assist systemic information through

⁴⁶² Waltz 1957; Marsh 1995; Wendt 1992; Walt 1997; Carr 2001; Carlsnaes, et al 2002; Schweller 2006; Griffiths 2007; Brown & Ainley 2009; Jackson 2011, Beavis 2017 online.

⁴⁶³ Ibid.

foreign policy. Liberalism ability to provide a viable enforcement mechanism to assist systemic information through foreign policy is undermined in favour of its quest for cooperation between states at the systemic level.⁴⁶⁴ Moreover, liberalism's focus on cooperation between states ignores significant legal differences between situations. The problem with the English School is that international society norms provide little restraining power on countries determined to seek conflict, and thus would have an inability to provide a framework under which the norms of an international society would affect state behaviour.⁴⁶⁵ English School is therefore unable to provide clarity for the enforcement of international principles found in the domestic legal framework, given its narrow approach. Constructivist theory's focus is on the location of and interaction between states in the international system.⁴⁶⁶ Subsequently constructivism does not allow for sufficient intervening variables in the formation of foreign policy given that authority is situated at the systemic level of analysis.⁴⁶⁷ Consequently, it is this author's belief that an expansion of the scope of international law and therefore its interpretation within the domestic framework could provide a clear development toward a changed scope of state sovereignty with respect to the state and human rights abuses, and clearer collaboration of states on the international level.

⁴⁶⁴ Brown & Ainley 2009:19-23.

⁴⁶⁵ Copeland 2003:427-435.

⁴⁶⁶ Robert Jervis 'Realism in the Study of World Politics' (Autumn 1998) 52, 4 *International Organization* 52, 4 971:976. For further critique of Wendt's work see Wight 1999 and Smith 2000.

⁴⁶⁷ Jervis 1998:976.

Towards A Neoclassical Realist Framework

While this Chapter recognises the abilities of different theories of international relations within both the state and international systems, the problem with these theories is that they do not answer the question - how states translate into practice a rule of international law that simultaneously claims the protection of human rights and permits the use of military force for that protection. This is specific to my analysis in that, in practice this means that the translation of capabilities into state power is often unpredictable over the short term.⁴⁶⁸ Neoclassical realism is able to answer this by way of the intervening variables. In that the intervening variables have the effect of strengthening or weakening the influence of systemic factors (of the international system) on unit-level. Neoclassical realism therefore provides a viable enforcement mechanism for states to determine how domestic-level legal processes are capable of assisting systemic information through foreign policy. As such, this assertion provides the basis for rejecting other theories of international relations as incompatible with this research.

Having established that neoclassical realism is the theoretical framework from which to analyse the case of humanitarian intervention, given that it allows for interaction between the systemic and domestic levels, this next section identifies the decision-makers which it is proposed affect, through domestic law, the influence of international law on the policy process.

⁴⁶⁸ For instance, see Jervis 1976.

The Decision-makers

Hudson has said, “if our IR [international relations] theories contain no human beings to understand the foreign policy process, they will erroneously paint for us a world of no change, no creativity, no persuasion, no accountability.”⁴⁶⁹ This is a fair assessment since decision making creates actions and are at the centre of policy approval. Both comparative foreign policy analysis and neoclassical realism account for the roles of *ideas* and *perceptions as interpreted* by decision-makers.⁴⁷⁰ They do so by incorporating the *human* reaction to perceived power⁴⁷¹ rather than absolute power only, highlighting the influence of the decision-makers’ perceptions and the state on the process of foreign policy formation. As indicated previously, for neoclassical realism structural factors remain influential in the decision-making process, but how the state responds to an international situation (for example, initiating a non-intervention policy, or intervening when the situation is deemed a threat to world security) and the assessment of power (the United States’ deference to France despite substantive policy differences or the use of the domestic legal structures). Once again, this highlights that since the use of force in humanitarian intervention is a

⁴⁶⁹ Valerie M. Hudson ‘Foreign Policy Analysis: Actor-Specific Theory and the Ground of International Relations’ (March 2005) 1, Issue 1 *Foreign Policy Analysis* 1:3. At the heart of the field is an investigation into decision making, the individual decisionmakers, processes and conditions that affect foreign policy and the outcomes of these decisions (Ibid.)

⁴⁷⁰ Sprout 1956; Hudson 2007:7; Rosenau 1975:109. Neoclassical realism also suggests that ideology and nationalism are essential elements of state power (Taliaferro 2006:219-222).

⁴⁷¹ This would include the capabilities of states to interpret, apply and execute the principles of international law.

fundamentally domestic legal-political decision, as is non-intervention, the way the facts relating to humanitarian concerns are interpreted and the arguments presented will have an impact in the decision-making process, especially when intervention is linked to human rights.

Sterling-Folker notes that in addition, what decision-makers think about a situation will have more influence on foreign policy than what is actually happening, since their opinion will define foreign policy regardless of whether that opinion is valid.⁴⁷² This position lies in the normative strength of the state and its relation to the international system which will determine a response by either limiting or increasing authority to react to an international appeal for humanitarian intervention. As discussed previously, this authority will either expand a legal norm or restrict that same norm within foreign policy.⁴⁷³ This can be observed where France and the United States differed in their perceptions of the four conflicts in sub-Saharan Africa, which influenced the legal status of humanitarian intervention in determining what course of action should be taken.

The differences in the domestic environments of the two states (legal and political) had a direct effect on the ability both states had in pursuing particular strategies toward the humanitarian interventions. Thus, despite the fact that systemic variables – the positions of France and the United States in the international system – served as the primary

⁴⁷² Sterling-Folker.

⁴⁷³ Thesis:115

influence on foreign policy, the intervening variables of the decision-makers' perception and state power (including each state's distinctive legal institutions) resulted in different approaches to decisions on whether to intervene and the use force for the protection of human rights or not to intervene. This approach explains the underlying causal factors that play a role in the varying degrees to which international law is implemented by decision-makers through enforcement of the terms of the individual state's foreign policy within an existing legal framework.

Therefore, based upon the insights of neoclassical realism into the importance of the beliefs and perceptions of decision-makers and their legal and political institutions, the interpretation of international law at the domestic level is crucial to the relationship between different legal regimes and the interpretive role of law during the domestic process in establishing foreign policy. In particular how humanitarian intervention is realized by a state.

6. The Research Methodology

The methodology builds on the previous chapters by outlining the specifics of the research. By positing the importance of legal interpretation and the role of domestic legal-political sources to assist systemic information through foreign policy, a set of methods was necessary to allow an analysis of these phenomena. Consequently, comparative foreign policy and neoclassical realism as outlined above

require a methodology with a dual function. This dual function is undertaken by *textual analysis*.⁴⁷⁴

Textual Analysis

The first function of textual analysis, as applied to this study, allows the logic of the interpretivist process during decision making to be examined, and is therefore explicitly concerned with how the foreign policy of France and the United States was formed concerning humanitarian issues in the four civil conflicts under discussion in Section Four. This seeks to answer the research question: do states interpret international law differently to support their foreign policy decisions to use force or not intervene for humanitarian reasons? The second function is concerned with each state's beliefs about the role of law, the way law and legal sources are created, authority and legitimacy interests domestically that underpin human rights and the protection of those rights. This seeks to answer the question how do we understand the sources and process of the strategic use of interpretation and legal reasoning for policy purposes? Notably, based on this domestic level of analysis, textual analysis will also address the question, if international law is politically constructed within a state's foreign policy through unit-level variables does international law attain political authority?

McKee notes, "textual analysis is a research method that requires the researcher to closely analyse the content of communication rather than

⁴⁷⁴ "Textual analysis ... is a methodology - a data-gathering process" (Alan McKee (ed) *Textual Analysis* Sage Research Publications 2003:5).

the structure of the content. ... This includes taking into account the purpose of the text, the time period in which the text was written and the audience for the text.”⁴⁷⁵ Textual analysis is unquestionable in its understanding of meanings and ideas expressed through written words, from the perspective of the researcher interpreting the data gathered.⁴⁷⁶

Consequently, a case study approach⁴⁷⁷ was undertaken to determine through textual analysis how state and international law interact simultaneously to produce a synthesis that is used to regulate foreign policy behaviour in the context of decisions effecting humanitarian concerns. Although the focus of the research is on the state’s domestic sources of law – legislative and judiciary, it also incorporates executive and senior administrative government members. Such an emphasis reflects the manner in which, “the executive departments of government, and the political appointees who head them, are at the core of the foreign policy-making process.”⁴⁷⁸ Hall asserts that, “policymakers customarily work within a framework of ideas and standards that specifies not only the goals of policy and the kind of instruments that can be used to attain them, but also the very nature of the problems they are meant to be

⁴⁷⁵ McKee 2003:7-8.

⁴⁷⁶ Lawrence Frey, Carl Botan and Gary Kreps *Investigating communication: An introduction to research methods* (2nd ed.) Allyn & Bacon 1999; see also Michael R. Harwell ‘Research Design in Qualitative/Quantitative/Mixed Methods’ in *The Sage handbook of qualitative research* (3rd ed) Sage Publications 2011.

⁴⁷⁷ Harwell 2011:148-149. Qualitative research is useful for answering how or why questions concerning situations or cases studies. Sampling is small and purposively selected for data collection (Lisa Webley ‘The Qualitative Approach to Legal Empirical Research’ Peter Cane (editor) *The Oxford Handbook of Empirical and Legal Research* 2010:35). Thesis:9.

⁴⁷⁸ Eugene Wittkopf, Charles W. Kegley, James M. Scott, and Charles W. Kegley *American Foreign Policy: Pattern and Process* (6th ed) Wadsworth/Thomson 2002:360.

addressing. This framework is embedded in the very terminology through which policymakers communicate about their work.”⁴⁷⁹ Hay agrees, he concludes that this domestic framework is internalised by decision makers and policy experts, and “acts as a source of guidance for conducting and evaluating policies, which defines the range of legitimate methods available. This in turn defines the very intentions and objectives of policy itself.”⁴⁸⁰ These texts are embedded within the domestic institutions of a state.⁴⁸¹ Text as Jackson argues, “sets out the parameters of official thinking and forms the basis of policy and action; it establishes the core principles, assumptions and knowledge ... implies the kind of actions that will be undertaken.”⁴⁸² Textual analysis therefore allows this thesis to analyse and interpret: the practices and particularities of the human beings formulating foreign policy; the intent of the decision-makers; the text itself – in both its form and content; the reactions to and views of the overall policy decisions on legal interpretation; and the wider historical/linguistic context without which specific meanings could not be produced in the first place.

As defined for purposes of this research, text (written, spoken, acted), includes documents specifying the functions and capacity of France and the United States, including government documents, internal government reports, letters written within the various administrations, constitutions,

⁴⁷⁹ Peter A. Hall ‘Policy paradigms, Social learning, and the State’ (1993) 25 (3) *Comparative Politics* 275:279; Thesis, p:81.

⁴⁸⁰ Hay 2001:197; Thesis:32-33.

⁴⁸¹ Ibid.

⁴⁸² Richard Jackson *Language, Politics and Counter-Terrorism* Manchester University Press 2005:17

charters and declarations, congressional hearing records, subcommittee statements, legislation, sources of law, etc. Particular attention is paid to what institutional legal structures have been established to develop foreign policy and its ability to cope with decisions regarding the use of force in humanitarian intervention and the roles of legitimacy and international law.⁴⁸³ This provides empirical confirmation that foreign policies are influenced by specific domestic institutional environments and lead to different legal-political strategies. Text selection was also supplemented with on-line Security Council Reports; Governmental and NGO Reports. This source of information will provide not only operational details and timelines, but also editorial comments and political statements. Further selection included: professional publications, academic books, journal articles, contemporary and historical media publications; as well as interviews and questions of legal and policy practitioners and academics.

An objective of this research was to gather primary data, however difficulties were encountered with this research. Issues of transparency became obvious, that is the ease with which one is allowed to view existing state documents from both France and the United States. In France this was a result of the rules governing secret documents.⁴⁸⁴ As a

⁴⁸³ This includes research at the Library of Congress, National Archives and State Department in Washington, D.C. in addition to the Library of the Ministry of Foreign Affairs, Paris, France. The author would like to thank Dr. Graham Brown's sponsorship for Oxford University's Bodleian Libraries and Dr. Roland Marchal's for l' Institut d'Etudes Politiques de Paris (research and law libraries).

⁴⁸⁴ In the case of Rwanda however new information aided this thesis from the beginning. On 6 July 2007, declassified government memorandums and diplomatic telegrams revealing Mitterrand's support for Habyarimana's regime and the RNA 'secret' French Ministry of Defence memorandum on the French Parliamentary Mission

result, I was denied permission to view archives of the French Ministry of Foreign Affairs (Quai d'Orsay) and the Ministry of Defence (Hôtel de Brienne), both of which contain policy documents, was denied, citing the 30-year rule. Access was also denied to the Institut François Mitterrand which holds the archives of the Mitterrand Presidencies (although legislature was produced after my French research visit). Therefore it was necessary to rely upon secondary documents because of the above governing rules. Cancelled meetings and interviews with government officials, which happened in both countries but primarily in the United States, were also encountered.

Of note, this thesis has intentionally limited the use of memoirs because as this author writes, decision-makers base their decisions upon their perception of the situation at issue and thus the foreign policy decisions in both France and the United States will reflect this.⁴⁸⁵

Placing France and the United States within the Case Study

To answer the questions central to this research it is necessary to understand the legal-political settings in which decision-makers shape foreign policy outcomes. Thus by comparing how the legal-political systems of France and the United States function, the research is able to

of Information for Rwanda, in charge of examining French policy on Rwanda from 1990 to 1994 was published, anonymously. *Armée et génocide - Documents qui reste Secret à ce jour* le 29 janvier 2008 (français. 2008), Agence Rwandaise d'Information [Archives de Paris, Fontainebleau, France].

⁴⁸⁵ This author is also uncertain whether memoirs accurately recant what happened in a situation or are written to justify a position instead of the actuality of the situation. Also, note that web links have been provided for ease of access to much of the evidence outlined in this thesis and the Bibliography.

consider the conceptual difficulties encountered when there are different legal regimes under study.⁴⁸⁶ Therefore the factors shaping the legal and political institutions, the state and international actors and domestic policy of France and of the United States are addressed. France and the United States were chosen for analysis for several reasons:

- Both have historical legacies and strategic relationships with Africa, as well as with each other, yet the legacies each have with Africa are very different.⁴⁸⁷
- As established in Chapter Two, structurally both are democracies with constitutional legal systems.⁴⁸⁸ However since the two states differ both in their relative international power (although both hold permanent seats on the United Nations Security Council) and in the natures of their political institutions (France is a unitary semi-presidential republic and the United States is a federal constitutional republic)⁴⁸⁹ it is possible to detect similarities and differences in their motivations in decisions to use force, or to intervene/not to intervene in these four African conflicts.
- As will be identified in the empirical chapters, states have different goals when facing an humanitarian issue.⁴⁹⁰ While France and the United States share values inherent in most democratic societies, such as liberty, equality and justice, the two have very different legal perspectives, particularly over the role of international institutions and

⁴⁸⁶ Lisa Webley 'The Qualitative Approach to Empirical Research' Peter Cane (editor) *The Oxford Handbook of Empirical and Legal Research* 2010.

⁴⁸⁷ Jouannet 2006; Lasser 2004; Friedman 1985; Fisher 1988; Clark 1993; Larsen 2007.

⁴⁸⁸ Jouannet 2006; Thesis:58.

⁴⁸⁹ Monateri 2012; Beasley 2013; Lasser 2004; Neack 2003; Germain 2003; Glendon, Gordon & Osakwe 1994.

⁴⁹⁰ For instance see, Abiew 1999; Bouchet-Saulnier 2001; Carla Bagnoli 'Humanitarian Intervention as a Perfect Duty' in Terry Nardin & Melissa S. Williams (eds) *Humanitarian Intervention* New York University Press 2006; Stanley H. Hoffmann *The Ethics and Politics of Humanitarian Intervention* University of Notre Dame Press 1996; Pattison, James *Humanitarian Intervention and the Responsibility to Protect: Who Should Intervene?* Oxford University Press 2010; Wheeler 2000; Bellamy 2006; Bellamy 2009.

the use of force.⁴⁹¹ And as Chapter Two illustrated, both international law and Africa are incorporated into domestic sources of law in France; whereas in the United States the structure of its legal institutions “makes incorporation of international law into the domestic system difficult.”⁴⁹²

- As a result this difference in legal perspectives will affect each state’s legal behaviour and its interpretation of humanitarian principles relative to intervention decisions. Interventions undertaken by France in Africa will present legitimacy problems because of its colonial past. This research will explore where France places its higher priority – human rights protection or its sphere of influence (*pré carré*).⁴⁹³ Whereas legitimacy problems concerning the United States in Africa are based upon its controversial interventions record.⁴⁹⁴ The United States’ interpretation of humanitarian principles will present a legal conflict based on the human rights situation’s compatibility with the Constitution and existing law. An example of which is the United States failure to intervene in Liberia, despite notification of human rights abuse in addition to its long standing relationship with Liberia.⁴⁹⁵

Thus, by comparing how the legal-political systems of France and the United States function, the research is able to consider the conceptual differences and approaches encountered when interpreting international

⁴⁹¹ See Jouannet ‘French and American Perspectives on International Law: Legal Cultures and International Law 2006.

⁴⁹² Jouannet 2006:442; David 1972; Germain 2003; Friedman 1984; Glendon, Gordon and Osakwe 1994.

⁴⁹³ ‘Pré-carré’ defines the African countries in which France exerts her influence after African independences through policies of cooperation. The term can be found in official governmental papers and reports. Touati 2007; Laurent Krief *Quelle est la différence entre la notion de concept et le concept de notion ?* Panthéon-La Sorbonne 2006.

⁴⁹⁴ Gloria Westfall *French Colonial Africa: A Guide to Official Sources* Hans Zell Publishers 1992; Jean Noël Loucou ‘Côte d’Ivoire: les résistances à la conquête coloniale’ (2007) Abidjan: CERAP.

⁴⁹⁵ John W. Harbeson and Donald Rothchild (eds) *Africa in World Politics* Westview Press 2000; Peter J. Schraeder *United States Foreign Policy Toward Africa: Instrumentalism, Crisis and Change* Cambridge University Press 1994. See also Jouannet 2006; Friedman 1984.

law within different legal regimes to understand the legal perception expressed by each in the formulation of foreign policy.⁴⁹⁶ This will add value to the literature, given that there have been few interdisciplinary connections between international legal study and foreign policy analysis.⁴⁹⁷ To understand the authority of influences on foreign policy behaviour, the four regional conflicts chosen for study: the Liberian civil war (1989), Operation Restore Hope (1992, Somalia), Opération Turquoise (1994, Rwanda), and the ongoing conflict in Côte d'Ivoire, will be assessed. In examining selected text specific to each conflict, the research is able to determine the domestic and international factors used to form varying foreign policy decisions concerning the use force for human rights protection or to not intervene, following the end of the Cold War.

The Regional Conflicts/Civil Wars

The frequency of regional conflicts has shaped not only international politics but domestic politics since the end of the Cold War.⁴⁹⁸ Several developments shaped relations with Africa in the 1990s. First, the end of the Cold War reduced the interest of external actors in Africa and was perceived to be marginal to global security issues. This then “allowed both France and the United States to link development and aid to

⁴⁹⁶ “The values and attitudes which tie together the system and which determine the place of the legal system in the society is considered as a whole” (Arnaud 1993:141).

⁴⁹⁷ Westra 2017; Dickovick and Eastwood 2015; Forsythe 1990; Most and Starr 1984.

⁴⁹⁸ Clark 2001; Alyiev 2011 [online]; Mark Huband *The Skull Beneath the Skin: Africa After the Cold War* Westview Press 2001.

democratization in sub-Saharan Africa.”⁴⁹⁹ This position changed, however, following the failure of the peacekeeping operations in Somalia and the genocide in Rwanda.⁵⁰⁰

The four conflicts under study have different historical backgrounds and occurred at different periods of time in the larger geopolitical context (1989 vs. 2002). The conflicts will illustrate how each government responded to the conflicts through its domestic legal structures and presents varying examples of intervention to human rights abuses in Africa that proliferated following the end of the Cold War to the emergence of the Responsibility to Protect Doctrine (“R2P”) which obligated states to protect their citizens.⁵⁰¹ Each conflict relates directly to legal-political challenges and legal differences involved in the formation of foreign policy relative to the contestation over human rights. Challenging decades of United States and French foreign policy in the African region.

For instance, when Liberia collapsed into anarchy and massacres after 1989, the United States failed to intervene, despite its long standing

⁴⁹⁹ ‘Political reform took centre stage in 1990 as the United States and France each stated that future foreign assistance to sub-Saharan Africa would be conditioned upon democratization’ (Donald Rothchild *Managing Ethnic Conflict in Africa* The Brookings Institution 1997:120-145); and 3 November 2009 meeting with Dr. Roland Marchal, Senior Research Fellow, Centre d’études de recherche internationales (CERI), l’Institut d’Etudes Politiques de Paris. Francis M. Deng, Donald Rothchild, and I. William Zartmann *Sovereignty as Responsibility: Conflict Management in Africa* (1996) Washington DC: Brookings Institution.

⁵⁰⁰ Ibid., Rothchild 1997; Marchal 2009.

⁵⁰¹ ICISS Report 2001. For a discussion on Africa and sovereign responsibility see, Bellamy 2006; Deng 2010:364-369; Deng, Rothchild and Zartmann 1996; Kansteiner 2009.

relationship with Liberia.⁵⁰² In Somalia, the United States was resolved to the fact that the breakdown of the Somali government merited United States intervention, yet government officials ignored the crisis in Rwanda except to evacuate United States' citizens from the area.⁵⁰³ Meanwhile due to France's 'precarious' *pré-carré* status,⁵⁰⁴ France chose to send military troops to protect French nationals, and other foreigners, in Rwanda and Côte d'Ivoire but failed to intervene in Rwanda despite the genocidal allegations that were repeatedly reported.⁵⁰⁵ France also undermined its position in Côte d'Ivoire by replacing French forces with ECOWAS⁵⁰⁶ forces in an attempt to guarantee a cease-fire.

These inconsistencies resonate with the practical legal dilemmas inherent to the position of France and the United States in Africa. These levels of intervention are particularly important when motives of national interest come into conflict with the implementation of humanitarian objectives based upon a state's legal structure and its interpretation of the principles of human rights, the use of force for the protection of those right, and issues of sovereignty.⁵⁰⁷

Finally, most research on humanitarian intervention analyses those interventions deemed illegal. For example, the establishment of no-fly zones in Northern and Southern Iraq in 1991 and 1992, the bombing of

⁵⁰² Harbeson and Rothchild 2000; Schraeder 1994. See also Jouannet 2006; Friedman 1984.

⁵⁰³ Ibid.

⁵⁰⁴ This status is situated within France's neo-colonial policies in Africa, Touati 2007; Krief 2006.

⁵⁰⁵ Westfall 1992; Loucou 2007.

⁵⁰⁶ Economic Community of West African States.

⁵⁰⁷ Jouannet 2006:128.

the Bosnian Serbs by NATO in 1995,⁵⁰⁸ and “the post hoc explanation that the 1999 NATO intervention in Kosovo was ‘illegal but legitimate’.”⁵⁰⁹ The four interventions in this study however all hold legal standing as defined by the international legal community, yet the domestic laws and mechanisms leading to political authority at the state level have never been questioned.

Research Questions and Hypotheses

Chapters Four and Five have presented the theoretical framework underpinning the thesis. Collectively, these chapters and the legal framework established a methodology which led to three assumptions about the effectiveness of international law in shaping the structure of authority and legitimacy within the decision-making process:

- Effectiveness results from interpretation and application as prescribed within the domestic legal framework.
- Systemic pressures create an agenda of reference for decision-makers (humanitarian situations position international rules/norms in the domestic legal framework) to explain foreign policy.
- The differences in security perceptions by decision-makers will have an impact on the intervening variables concerning interpretation and application relevant to sources of law.

Essentially the aim of the methodology is to underpin an answer to the puzzles which are at the core of this research. These puzzles can be summarized by three specific interrelated research questions and proposed hypotheses:

⁵⁰⁸ Shaw 2008.

⁵⁰⁹ Ian Hurd ‘Is Humanitarian Intervention Legal? The Rule of Law in an Incoherent World’ (2011) 25, No. 3 *Ethics & International Affairs* 293:301.

1. Do states interpret international law differently to create legal authority to support their foreign policy decisions to use force or to not intervene for humanitarian reasons so that the rules arguably function within the international system?

The research provides examples of humanitarian intervention as a case study using four regional conflicts situated in Africa from 1989 to 2002 to assess the degree to which France and the United States interpret international law differently. Since law (domestic and international) is dealt with through a state's legal institutions, decision-makers will base their decisions on the appropriate form of interpretation based upon their beliefs about the role of law and the way law is created within each state; this would include sources of law. This thesis postulates that while the content of the rules of international law (human rights, sovereignty and the use of force) is the same, the underlying difference is whether the rule meets the criteria of effective legality from within the relevant state and how that criterion is interpreted through the state's legal institutions. This builds on the existing literature in that it reinforces the thesis' position that the interpretation of international law and its conceptualisation at the domestic level, through a state's domestic legal framework, is crucial to understanding how state and international law interact simultaneously in foreign policy to effect humanitarian concerns.

2. How do we understand the sources and processes of the strategic use of interpretation and legal reasoning for policy purposes, particularly since decision-makers tend to interpret potential security threats in different ways?

The scope of foreign policy serves state interests from a wide range and the legal foundations of foreign policy are made up of the rules of both international law and domestic law. This thesis predicts that although the structure and the rules of both international and domestic institutions will sometimes force change due to unforeseen crises or situations, foreign policy will obey certain legal rules regarding the

course of action to be taken in similar security situations. Because many international rules such as those pertaining to human rights have their origins within a state's domestic structure, these legal rules, as this research argues, will act as a framework to regulate state behaviour.

3. If international law is politically constructed within a state's foreign policy through its unit-level/intervening variables does international law attain political authority?

It is hypothesised that in authorising the importance of systemic variables, neoclassical realism allows for the consideration of systemic factors such as the distribution of capabilities (the capability of states to interpret, apply and execute the principles of international law) which forms the permissive environment for foreign policy. In applying neo-classical realism the state, by utilizing its domestic legal and political structures as a mechanism for international authority, allows for structures of hierarchy otherwise absent in the international system.⁵¹⁰ This is achieved by allocating space to the interpretative process through the state's unit-level variables.

It is helpful at this point to reiterate the three causal factors the empirical section puts forth to make its argument as affecting the principles of international law on the policy process of each conflict: 1) the decision-makers' arguments for foreign policy reasoning; 2) the domestic legal framework, which includes legal tradition and sources of law; and 3) the actions of the United Nations.⁵¹¹ Based upon these causal factors separate rationales for foreign policy decisions, specific to each conflict,

⁵¹⁰ Rose 1998:5:1; Rosenau 1966; Thesis p:10, footnote 26; Thesis Chapter 3 p:82-83; Thesis Chapter 2 p:55, 57-64 (How Legal Behaviour Shapes Foreign Policy Toward International Law).

⁵¹¹ Although the media is not considered a determining factor in this thesis, the research does recognise that the media may influence decision-making in certain conflict situations.

are applied in this thesis. As the empirical cases will establish, the rationale behind the forming of foreign policy decisions stems from the relevant facts and information presented for evaluation and differences in the interpretation of the information provided relevant to each conflict. The case studies address the underlying problem of the research, which is not whether a rule of international law is legally binding but rather how states translate into practice a rule of international law that simultaneously claims the protection of human rights and permits the use of military force for that protection.

Summary

Chapters Four and Five have presented the theoretical framework underpinning the thesis. Together these chapters and the legal framework presented in Section One explain the thesis methodological focus on legal study and foreign policy analysis which then formulate the research questions.

Chapter Four has considered the comparative foreign policy analysis approach to foreign policy. In building upon this comparative approach the author evaluated the rationale for the use of neoclassical realism as a tool by which to consider the foreign policy decisions of France and the United States in the face of threats to humanitarian principles.

Chapter Five has asserted that neoclassical realism is better suited to this thesis than other theories of international relations, and has established this by critiquing realism, liberalism, constructivism and the English

School. The chapter has argued that unlike liberalism, neoclassical realism does not underestimate the importance of variables at the systemic level.⁵¹² Nor does neoclassical realism lack a theory of the state, despite the views expressed by constructivists.⁵¹³ In distancing itself from constructivism's systemic theory, neoclassical realism also rejects any obscure version of law as resting on merely ideational factors,⁵¹⁴ given the underlying approach of the research. Moreover, given the English School's narrow approach, which holds that all participants share the same fundamental opinions regarding the nature of the international system, the English School would be unable to integrate different legal norms and policy that allow for essential change with regard to interests and norms in the domestic framework.⁵¹⁵

Neoclassical realism asserts that as a point of analysis the domestic decision-making environment positions humanitarian concerns between the international system and foreign policy by authorising the importance of systemic (independent) variables.⁵¹⁶ Thus, neoclassical realism allows for the consideration of systemic factors such as the distribution of capabilities (the capability of states to interpret, apply and execute the principles of international law) which forms the permissive environment for foreign policy.⁵¹⁷ In this way, state law mediates the tension between the rules of international law and foreign policy and will fuse with

⁵¹² Brown & Ainley 2009:19-23.

⁵¹³ Jervis 1998:976.

⁵¹⁴ Quinn 2013:159.

⁵¹⁵ Copeland 2003:427-435.

⁵¹⁶ Rosenau 1980; Rose 1998; Schweller 2006; Griffiths 2007; Donnelly 1999.

⁵¹⁷ Rose 1998; Lobell, Ripsman and Taliaferro 2009; Schweller 2006; Zakaria 1997.

international law to affect foreign policy within a particular state. This in turn allows international law to regulate the interaction between the state and its position in the international system.

Lastly, Chapter Six has outlined the methodology and determined the formulation of the research questions and hypotheses that this research will test in the form of comparative studies between France and the United States to determine how state and international law interact simultaneously in foreign policy to effect humanitarian concerns.

The next chapter, Chapter Seven, provides a brief historical background to the concepts of intervention and non-intervention (sovereignty) in relation to the theme of this thesis and the empirical chapters to follow. It aims to highlight the key debates on the progression of humanitarian intervention and places this progression in the context of the foreign policy decisions underpinning humanitarian intervention in the 1990s. The chapter also discusses the distinction between legitimacy and legality of actions.

Section Three:
***The Relevance of the Humanitarian
Intervention Debate***

“Count up the results of fifty years of human rights mechanisms, this is a failure of implementation in a scale that shames us all.”

Mary Robinson, 10 December 1998

‘Never again ...’

III. The Relevance of the Humanitarian Intervention Debate

In the previous chapters the legal and theoretical foundations of the thesis were defined. This outlined their significance to the interpretation of international legal principles in foreign policy decisions to establish a legitimate basis for humanitarian intervention to affect foreign policy behaviour. In order to advance the legal and theoretical positions outlined in the previous chapters, this section links their relevance to the development of humanitarian intervention to demonstrate that the implementation of humanitarian intervention is influenced by the legal and theoretical foundations as asserted. To do so, it is necessary to review some of the historical background on the concepts of intervention and sovereign non-intervention and the various legal debates that continuously reappear. This section introduces the reader to this background and its legal debates and segues to the empirical chapters that follow, in that it also helps to establish how levels of intervention and changing international principles affected those caught within civil conflict.

7.a. The Principles of Intervention and Non-Intervention

An important question for the international community is whether to intervene forcibly to stop a massive and systematic violation of basic human rights committed by the authorities of one state against its own citizens. Looking at the development of the principles underpinning humanitarian intervention offers historic insight into situations where humanitarian action was or was not taken. Given the focus of this research, this will prove particularly useful when considering that the globalization of rules and procedures, at both the international and domestic level, will affect the scope of legal interpretation which may be considered unprecedented given the ongoing debate on human rights protection. This chapter will therefore provide a brief outline of the background leading to the development of humanitarian intervention as a concept and how it has been used differently in various cases. This historical perspective on the humanitarian intervention debate will provide a focus to the empirical cases of the Liberian civil war (1989), Operation Restore Hope (1992, Somalia), Opération Turquoise (1994, Rwanda) and the ongoing conflict in Côte d'Ivoire (2002, present), which this thesis analyses to establish how states interpret the rules of international law for humanitarian concerns.

During the period between 1990 and early 2000 humanitarian intervention emerged as a challenge to traditional theories of international legal study and foreign policy analysis concerning

protection for civilians caught within intra-state violence.⁵¹⁸ As the conflicts in Liberia, Somalia and, with qualification Rwanda illustrate,⁵¹⁹ decisions to use force were argued against what limits, if any, should be imposed upon a sovereign state's actions when it came to internal matters that were deemed external and non-threatening to another state or to international security. As indicated at the start of this research, one of the fundamental problems of humanitarian intervention during the 1990s was that there were no formal legal guidelines or legal mechanisms at the state level for humanitarian intervention decisions in place at the time.⁵²⁰ This thesis contends that the problem was situated in the capacity of states to produce institutions at the domestic level capable of assisting international humanitarian principles through the foreign policy process.

Notwithstanding state sovereignty debates, during the early 1990s the question of justifiable humanitarian intervention⁵²¹ took on new urgency when states, the United Nations and regional organizations intervened to help people subject to gross violations of human rights, from Iraq in 1991, Rwanda in 1994 to East Timor in 1999 and Côte d'Ivoire more recently. Since the 1990s there has been a growing argument that certain

⁵¹⁸ ICISS Report 2011; Alex Bellamy and Ruben Reike 'The Responsibility to Protect and International Law' (2010) 2, Issue 3 *Global Responsibility To Protect* 267; Walter Clarke and Jeffrey Herbst 'Somalia and the future of humanitarian intervention' (Mar/Apr 1996) 75, 2 *Foreign Affairs* 70.

⁵¹⁹ Gershoni (1997) discusses the ineffectiveness of the international community during the Liberian conflict; the 1992 United Nations Security Council Resolution 767, S/RES/767, notes the deteriorating political and humanitarian situation in Somalia but the Security Council seemed unable to come to a unanimous vote; Barnett (1997) discusses the Security Council's indifference and genocide in Rwanda; see also Kansteiner 2009; Clark 1993; Dallaire 2004; Wheeler 2000.

⁵²⁰ "A lack of clear criteria as to when intervention is justified, if not required, suggests that the question is one of interpretation, subject to specific circumstances and particular interests" (Guiora 2013:422).

⁵²¹ Thesis footnote 518.

human rights violations - genocide, crimes against humanity, and ethnic cleansing, all constitute threats to international peace and security and fall outside a state's domestic jurisdiction.

In these instances the use of force was deemed necessary to protect those being violated against. For example, this was first enforced in 1992 when the Security Council held that violations of international humanitarian law, in addition to 'the magnitude of the human tragedy,'⁵²² were factors in its determination that the violence and instability in Somalia constituted a threat to international peace and security.⁵²³ Despite this determination, during this period we began to witness contestation over the meaning of human rights in conflict situations as well as discussion of the need for human rights protection.

With the emergence of the Danish Institute Report (1999)⁵²⁴ and the Responsibility to Protect Doctrine (2001),⁵²⁵ there was international acceptance that certain human rights violations should be protected by a responsible international community.⁵²⁶ Despite this acceptance,

⁵²² Security Council Summit Statement Concerning the Council's Responsibility in the Maintenance of International Peace and Security, UN Doc S/23500 1992, (1992) *UNYB* 33, in Chesterman 2002:300-301.

⁵²³ Abbott 2005; Thomas M. Franck *Recourse to Force: State Action Against Threats and Armed Attacks* Cambridge University Press 2002 (Franck discusses the evolution of the international use of force rules).

⁵²⁴ *The Danish Report* (1999); Evans and Sahnoun (2001).

⁵²⁵ ICISS Report 2001.

⁵²⁶ Security Council Resolution 1674, adopted on 28 April 2006, "reaffirms the provisions of paragraphs 138 and 139 of the 2005 World Summit" and commits the Council to action to protect civilians in armed conflict. Scholars have noted however that "there are some key differences between the original ICISS doctrine and the World Summit Outcome" Heinze 2011:12; Hehir 2010:119; Pattison 2010:14. See also, Secretary-General Ban Kimoon's Report entitled *Implementing the Responsibility to Protect* developed with Special Advisors Francis Deng and Edward C. Luck (Report of the Secretary-General, UN document A/63/677 January 2009); and *Early Warning*,

consensus among states remains elusive and identifying how human rights norms translate into practice when cases of humanitarian concerns arise still proves to be challenging for decision-makers given that humanitarian intervention arises from two competing demands – the protection of human rights and sovereignty.⁵²⁷ Subsequently, the translation of human rights norms may differ between states when it involves the simultaneous application of laws on the use of force and attention to human rights. As a result, and as the research will show, whilst states may agree that a particular international legal rule exists, states may then understand the rights or obligations of that rule in different ways.

Given that the rules prohibiting forcible intervention have been codified in the United Nations Charter (Article 2 (4)), this chapter begins with the historical evolution of the principles of intervention and non-intervention. Focus then turns to the contradictions between use of force and sovereignty, highlighting the key debates on the development of humanitarian intervention. The chapter concludes by distinguishing between the legality and legitimacy of actions, given the general confusion on their differences to determine the extent to which humanitarian rhetoric is undermined by this confusion. To do this the chapter makes use of the 1999 NATO intervention in Kosovo and the

Assessment, and the Responsibility to Protect, (Report of the Secretary-General, UN document A/64/864, 14 July 2010).

⁵²⁷ ICISS Report 2011; Abiew 1999:58; Alex Bellamy and Paul Williams ‘The New Politics of Protection? Cote d’Ivoire, Libya and the Responsibility to Protect’ (2011) 82, no. 7 *International Affairs* 825; Stephen D. Krasner (ed.) *Problematic Sovereignty: Contested Rules and Political Possibilities* Columbia University Press 2001.

recent crisis in Syria. This chapter however does not explain the manner in which sovereignty is pursued nor does it explain the escalation of conflicts over self-determination as it is beyond the limits of this thesis.

Echoes of the Past – the Basic Principles

There remains ongoing debate surrounding the protection of human rights during intra-state conflict. Hoover argues the contestation over the meaning of human rights concerning protection for those caught in conflict situations is recognised within both the international and state systems.⁵²⁸ The meaning of human rights proves to be challenging not only due to its normative status and how that status is perceived as codified in the Charter of the United Nations, Article 2.4; but as Besson notes, because “[p]roponents of human rights usually have a hard time responding to critiques that bear on the justifications”⁵²⁹ of those rights when making decisions as to whether to intervene or not intervene.⁵³⁰

As is well documented, earlier guiding principles relating to state sovereignty can be traced back to the agreements made by European states as part of the Peace of Westphalia in 1648.⁵³¹ The Peace of Westphalia initiated the modern western-European state system,

⁵²⁸ United Nations General Assembly Resolution 217 (A/RES/3/217 A) 1948 [online]. “Within the founding text of the contemporary human rights movement there is an ambiguous account of rights” (Jon Hoover ‘Rereading the Universal Declaration of Human Rights: Plurality and Contestation, Not Consensus’ (2013), 12 issue 2 *Journal of Human Rights* 217). See, Michael Goodhart ‘Human Rights and the Politics of Contestation’ in *Human Rights at the Crossroads* Oxford University Press 2014.

⁵²⁹ Besson 2014:34.

⁵³⁰ “Changes in norms create the only permissible conditions for changes in international political behaviour” (Thakur & Weiss 2009); Evans 2009, Bellamy 2016.

⁵³¹ Leo Gross ‘The Peace of Westphalia, 1648-1948’ 48 *American Journal of International Law* 42 (1) 1948.

established the nation-state as the principle actor in international law, and essentially institutionalized sovereign non-intervention.⁵³² The non-intervention rule became the central legal principle for the sovereign state and the international system. The post-1945 system of international order is based on this model.⁵³³

The non-intervention principle is also identified in a number of legal texts, including: regional and international treaties, United Nations resolutions and decrees of the International Court of Justice. The incorporation of non-intervention is a founding principle of both the League of Nations Covenant⁵³⁴ and the United Nations Charter⁵³⁵, all of which confirm the rule's formal primacy. As a result, non-intervention is considered the supreme *jus cogens* norm of international law, and is defined as the authoritative principle recognised by the international community.⁵³⁶

⁵³² Kelly 2000:110-111; Kritsiotis 1998. Non-intervention is a founding principle of both the League of Nations Covenant (Article 10, *reprinted in* Evans 2006:3) and the United Nations Charter (Article 2 paragraphs 4 and 7, *reprinted in* Evans 2006:9), all of which confirm the rule's formal primacy. The non-intervention principle is also identified in several legal texts, including: regional and international treaties, United Nations resolutions and decrees of the International Court of Justice.

⁵³³ Kelly 2000:402-409. "States jealously treasure the principle of non-intervention and it is the chief envy of aspiring states because it is the legal insurance of their sovereign existence" (Kritsiotis 1998:1009).

⁵³⁴ League of Nations Covenant, article 10, *reprinted in* Evans 2005:3.

⁵³⁵ The UN Charter, article 2 paragraphs 4 and 7, *reprinted in* Evans 2006:9.

⁵³⁶ *Jus Cogens* is "the peremptory principles or norms recognised by the international community as being fundamental to the maintenance of an international legal order." *Black's Law Dictionary* [online].

The twentieth century, however, witnessed a series of changes which affected the sovereign non-intervention principle.⁵³⁷ Two World Wars and the gross atrocities associated therein forever altered strategic assumptions between states and influenced decision-makers. Because of these gross atrocities, decision-makers in the twentieth-century sought to establish, through the League of Nations, the Kellogg-Briand Pact⁵³⁸ and the United Nations, an international legal framework that would centralize decision-making concerning the use of force and create a system to prevent the use of violence in resolving conflicts and attempt to minimize the impact of violence on citizens. This culminated into the Charter of the United Nations, Article 2 (4).⁵³⁹

The 1945 Nuremberg Tribunal and the International Military Tribunal in Tokyo began the modern international tribunal process by establishing legal precedent whereby international courts could bring legal action against political and military officials for war crimes and crimes against

⁵³⁷ Mark Janis and John Noyes *International Law: Cases and Commentary, Third Edition* Thompson/West Publishers 2006; Stanley N. Katz *The Oxford International Encyclopedia of Legal History* Oxford University Press 2009

⁵³⁸ Neither the League of National nor the Kellogg-Briand Pact could prevent World War Two however Malanczuk 1997; Abiew 1999, 26-7.

⁵³⁹ Janis and Noyes 2006; Katz 2009; Malanczuk 1997.

humanity.⁵⁴⁰ The proceedings also promised the future installation of a permanent international tribunal.⁵⁴¹

The Universal Declaration of Human Rights (1948),⁵⁴² although not legally binding, was one of the first attempts by the international community to reconcile sovereignty and human rights.⁵⁴³ At the same time however the variance between justifications for the legality of humanitarian issues and the moral aspects associated with humanitarian concerns begins to appear. For instance Besson argues justifications continue to affect the allocation of human rights practice because appropriate international action has yet to establish an effective mechanism or enforceable rules within either state or international systems.⁵⁴⁴ (Besson's position ties to this thesis' theoretical argument concerning neoclassical realism's ability to provide a viable enforcement mechanism to assist systemic information through foreign policy based on its level of analysis.)

⁵⁴⁰ For an opposing view on approaches to the installation of tribunals see Jon Kyl's *The War of Law: How New International Law Undermines Democratic Sovereignty* (2013) who argues "the growing acceptance of transnational legal concepts has practical consequences. One has been the practice of courts targeting foreign officials for supposed wrongdoing. Using a 1994 law originally aimed at Rwanda's genocidaires, activists in Belgium filed war crimes charges in 2003 against former U.S. President George H. W. Bush, ... alleging that they killed civilians by ordering a missile attack on Baghdad during the Persian Gulf War."

⁵⁴¹ The International Criminal Court (ICC), under the Rome Statute, was adopted on 17 July 1998 and came into effect on 1 July 2002. The ICC's aim is to advance the rule of law and the notion of international justice. Unlike the ICJ, the ICC is legally and functionally independent from the United Nations. The Rome Statute however grants certain powers to the United Nations Security Council. http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.html.

⁵⁴² Universal Declaration of Human Rights (A/RES/3/217 A) 1948 [online].

⁵⁴³ Hoover 2013:217.

⁵⁴⁴ Besson 2014:35-38.

One of the key principles of the Declaration was to confirm a move in international affairs to human rights as an international concern.⁵⁴⁵ Under the scope of the Declaration we began to witness a transformation in state and international accountability for human rights protection under the Covenants mandated by the Committee on Economic, Social and Cultural Rights (ESCR).⁵⁴⁶ These Covenants emerged as quasi-legal international mechanisms for enforcing and protecting human rights within the international system.⁵⁴⁷

Other enforcement mechanisms for human rights within the United Nations include the Convention on the Prevention and Punishment of the Crime of Genocide,⁵⁴⁸ the High Commissioner on Human Rights, whose duties include ensuring that standards associated with human rights are met;⁵⁴⁹ the Human Rights Council,⁵⁵⁰ and treaty monitoring bodies. Their role as enforcement mechanisms is to encourage compliance and have a binding effect upon those who have agreed to them - in that it places international law into the legal systems of states to define and effect policy decisions. This may afford the organizations within the UN accessibility in establishing higher standards but it will also act as a barrier at times. This is possibly best witnessed by the treaty on

⁵⁴⁵ Evans 2006; Goodhart 2014.

⁵⁴⁶ Universal Declaration of Human Rights (A/RES/3/217 A) 1948 [online], Articles 22-27 details economic, social and cultural rights.

⁵⁴⁷ Ibid.

⁵⁴⁸ *Convention on the Prevention and Punishment of the Crime of Genocide* Resolution 260 (III) A of the United Nations General Assembly 1948 [online]; Janis and Noyes 2006; Katz 2009; Malanczuk 1997.

⁵⁴⁹ Alfred de Zayas 'Human Rights, United Nations High Commissioner for' in Helmut Volger, *Concise Encyclopedia of the United Nations* Kluwer 2002 217. Official website of the Commissioner: <http://www.ohchr.org/EN/pages/home.aspx>.

⁵⁵⁰ Evans 2006. Official website for the Council: <http://www.ohchr.org/en/hrbodies/hrc/pages/hrcindex.aspx>.

genocide, the laws of which were not enforced until the 1998 International Criminal Tribunal for Rwanda despite repeated knowledge of gross violations of human rights abuses during the 1990s and before.

Although these UN organizations have some jurisdiction over cases concerning human rights, for example the settlement of international disputes by peaceful means, including arbitration and judicial settlement (Article 33)⁵⁵¹ and to encourage the development of international law and its codification (Article 13);⁵⁵² there are two different legal regimes at play. This is because the enforcement of international law and therefore human rights is the legal responsibility of the state which acts as the initial path toward an effective enforcement mechanism.⁵⁵³ As a general rule there is a certain level of disparity between the human rights principles states have endorsed and the principles often discussed in foreign policy given that limitations inherent to any state's legal institution will cause the state's conduct to differ from the expectations of the international system.⁵⁵⁴

During the Cold War the principle concerning humanitarian intervention was pushed, to some extent, in a different direction based upon the ideological objectives between communism and capitalism.⁵⁵⁵ Although the end of the Cold War brought about an optimistic international legal

⁵⁵¹ The United Nations Charter *reprinted in* Evans 2005:10).

⁵⁵² The United Nations Charter *reprinted in* Evans 2005:7).

⁵⁵³ Donnelly 1999:71-102; Jouannet 2009:128; Armstrong and Farrell 2012:271; Tomuschat 1999; Thesis p:71-72.

⁵⁵⁴ Coleman 2008:4-5; Brunnée & Toope 2012:1; Hart 1961; Andrei Marmor 2005.

⁵⁵⁵ Ignatieff 2003; Cohen 2000; Kansteiner 2009.

environment, the focus of conflict subsequently shifted from an international struggle consisting of East-West hostilities to a situation comprised of several intra-state conflicts. In which state order collapsed in some areas of the world, particularly Africa, often resulting in gross violations of human rights.⁵⁵⁶

This shift in focus brought about further debate concerning human rights and the concept surrounding humanitarian issues. Debate focused mainly on the question of whether violations of human rights constituted a threat to international peace and security.⁵⁵⁷ Holzgrefe questioned whether gross and systematic violations of human rights should be allowed to continue unchecked.⁵⁵⁸ Whilst Hehir noted there was “a marked unwillingness amongst States to intervene when national interests are not at stake regardless of the humanitarian suffering taking place.”⁵⁵⁹ Wheeler’s argument centred on the change of norms in relation to the legitimacy of humanitarian intervention.⁵⁶⁰ The problem facing the international community at the time therefore was no longer that the Security Council was unwilling to intervene, but that it was unable to intervene in compliance with Article 2.7, which seemingly

⁵⁵⁶ Ignatieff 2003; Coleman 2007:21-45; Baehr 2004:16. For a discussion on Africa and sovereign responsibility see, Bellamy 2006; Deng 2010:364-369; and Deng, Rothchild and Zartmann 1996.

⁵⁵⁷ See for instance, Security Council Summit Statement Concerning the Council’s Responsibility in the Maintenance of International Peace and Security, UN Doc S/23500 1992, in Chesterman 2002:300-301

⁵⁵⁸ Holzgrefe 2003:1.

⁵⁵⁹ Aidan Hehir *Humanitarian Intervention: An Introduction* Palgrave MacMillan 2010:177.

⁵⁶⁰ Wheeler 2000.

prohibits intervention in situations ‘essentially within the domestic jurisdiction of any state.’⁵⁶¹

Later the link between human rights and security was largely recognised by the United Nations Security Council who interpreted Article 39 (1992 Somalia) as permitting collective involvement in intra-state conflicts.⁵⁶² By the end of the 1990s however and with the 1999 NATO intervention in Kosovo, the level of debate questioning whether such interventions needed Security Council approval increased.⁵⁶³ Nonetheless, as a result of the restored functioning of the Security Council, the majority of interventions after 1990 were authorized. This includes the landmark decision for intervention in Somalia (Resolution 751)⁵⁶⁴ and the Resolutions authorising humanitarian action in Rwanda. Although the intervention in Somalia was the first time a Chapter 7 intervention was initiated, the Somalia intervention failed to establish precedent for humanitarian intervention given that consistency in humanitarian actions was not developed. Evidence of which was later witnessed by the inaction of the international community in Darfur, Rwanda and Kosovo,

⁵⁶¹ Evans 2006:9.

⁵⁶² Chesterman 2002.

⁵⁶³ It can be argued however that the Security Council’s inability to act in Rwanda, amongst other civil conflicts, represents a more serious threat than its lack of action in Kosovo.

⁵⁶⁴ This Resolution marks the first instance where the Security Council specifically expressed human tragedy as a threat to international peace and security and justified use of force in accordance with Chapter 7 of the United Nations Charter [online: <http://unscr.com/en/resolutions/751>].

despite evidence of systematic human rights violations severe enough to warrant humanitarian intervention.⁵⁶⁵

The moral and legal justification for the Somalia intervention was based in Security Council Resolution 668 (Iraq 1991) which emphasised the relationship between violations of human rights within a state and the threat to international peace and security as sufficient for ordering humanitarian intervention.⁵⁶⁶ Resolution 668 however did not expressly authorize military intervention but it did elicit international debate with regard to paragraph one of the Resolution which read “a threat to international peace and security;”⁵⁶⁷ and which would later be justified in Operation Desert Fox (1991) by appealing to the fact that international peace and security were in danger. Reasonably Resolution 668 could therefore be interpreted as expressing an evolving *opinio juris* regarding the legality of humanitarian intervention (the belief that an action was carried out because it was a legal obligation).⁵⁶⁸

The basis of providing a discussion on humanitarian intervention relates to the theme of this thesis concerning how levels of intervention and changing international principles affected those caught within civil

⁵⁶⁵ NATO eventually intervened on Kosovo’s behalf. The NATO intervention remains controversial.

⁵⁶⁶ Resolution 668 was then used to justify Security Council Resolution 688 (Operation Desert Fox), adopted 5 April 1991, but it does not contain language which explicitly authorizes military actions under Chapter 7. A full text of the Resolution can be found at <http://www.fas.org/news/un/iraq/sres/sres0688.htm>.

⁵⁶⁷ United Nations Security Council Resolution 668 (Doc.S/RES/668(1991) [online]. Stephen R. Heder and Judy Ledgerwood *Propaganda, politics, and violence in Cambodia: democratic transition under United Nations peace-keeping* Sharpe Press 1996.

⁵⁶⁸ Raphaël van Steenberghe ‘State practice and the evolution of the law of self-defence’ (2015) *Journal on the Use of Force and International Law* 2, issue 1:81.

conflict. A discussion on the authorization of humanitarian interventions is not the subject of this thesis however. What is of subject are the legal and strategic factors that led states to develop decisions to intervene for humanitarian reasons in the framing of foreign policy, since humanitarian intervention involves the simultaneous application of laws on the use of force and attention to human rights. The underlying problem is not whether a rule of international law is legally binding but rather how states interpret a rule of international law that reasonably claims application of the same question.

For instance the scope of humanitarian intervention must operate within the law to establish legality. The application of the question concerning intervention must include objective language and evidence to construct a case to intervene or not based upon the violation of human rights during the decision-making process at both the state and international levels. The basic principle of human rights represents the same principles in state and international laws.⁵⁶⁹ There are no differences about what human rights constitute, however the facts or circumstances and thus interpretations and justifications that may result in the protection of human rights differs for each state.

It is suggested here that this difference is based upon the interpretation of those facts from within each state's distinctive legal framework, the

⁵⁶⁹ That is to say the universal recognition that basic rights and fundamental freedoms are inherent to all human beings, inalienable and equally applicable to everyone, had found in the Universal Declaration of Human Rights 1948 [online]; the French Constitution and the United States Constitution.

values ascribed to the interest position at issue, and on the substantive limits that legislatures have enacted or on which courts have ruled. Therefore, while the fixed content of the rules of international law (sovereignty or the use of force or attention to human rights) is the same, the underlying difference is whether the rule meets the criteria of effective legality from within the relevant state (unfixed) and how that criterion is interpreted for application.

Therefore, although states may agree that the principle of human rights exists (as well as laws on the use of force and sovereignty) the justifications and obligations under this principle are translated differently and will therefore affect the protection of civilians. This is because the justification of human rights is based on information as received while the legitimacy of the rights requires authority.⁵⁷⁰ Such contestation over the protection of human rights is based on external normative grounds which international and state legal systems find difficult to reconcile relative to legal authority.⁵⁷¹ This raises complex questions as to the implementation of human rights in both France's and the U.S.'s legal systems and how the function of human rights may or may not effect legal change at the state and international level. It also reflects a different understanding of the relationship between law and policy since laws are the standards and procedures governments should follow to achieve policy goals.⁵⁷² This difference will have significance

⁵⁷⁰ Coleman 2008:4-5; Dworkin 1986:190; Dworkin 2009; Besson 2014:35.

⁵⁷¹ Reus-Smit, 2004:40; Kratochwil 2014; Tunkin 1984; Forsythe 1990.

⁵⁷² Hill 2003:279; Hay 2002:197; Rose 1998.

when conditioned with issues of authority and legality for foreign policy, which as this thesis contends are determined by a state's interpretation of an international rule at the domestic level.

In line with the above, the next section examines the distinction between legitimacy and legality to determine the extent to which humanitarian rhetoric is undermined by the ongoing debate over the protection of human rights during intra-state conflict.

Key Reoccurring Legal Debates on Humanitarian Intervention:

Law and policy specialists have traditionally contrasted humanitarian intervention's attention to human rights and state sovereignty by discussing under what circumstances the former should be allowed to interfere in the internal affairs of any given state. In practice, discussions of what to do regarding intra-state violence when there is blatant humanitarian suffering remains prominent concerning failed states.

As will be discussed in further detail below, most literature and debate analyse foreign policy and international law from the viewpoint of the legitimacy and legality of the use of force in humanitarian intervention at the systemic level.⁵⁷³ Bellamy argues "that this is largely due to lingering concerns about RtoP's potential to legitimize interference in the

⁵⁷³ The literature is extensive, see for instance: Security Council Resolution 1674 (2006) which reaffirms the 2005 World Summit regarding "the responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity." Bellamy 2006:143; Nicholas Wheeler and Alex Bellamy 'Humanitarian Intervention in World Politics' in *The Globalization of World Politics* Oxford University Press 2008:522; Bellamy 2010; Bellamy and Williams 2009; Thakur 2002; Luck 2011; Heinz 2011; Hurd 2011; Forsythe 2000.

domestic affairs of states and other fears about abuse.”⁵⁷⁴ Besson argues that this systemic debate is because the issue regarding humanitarian intervention does not centre completely on the nature of the rights involved but also on when to enforce those rights.⁵⁷⁵ This is clearly reflected in Danish Institute Report (1999) and the Responsibility to Protect Doctrine (2001), which Wheeler and Bellamy argue were invoked to support international involvement against intra-state conflict but fail to bring state institutions into the discussion.⁵⁷⁶ The literature is therefore limited to how the state should respond to a humanitarian challenge relating to regional conflict.

The doctrine of humanitarian intervention is historically strongly tied to the theory of just war (*bellum justum*).⁵⁷⁷ Throughout history the use of force was seen as the means for implementing foreign policy and resolving disputes among nation-states.⁵⁷⁸ The general inference behind the theory of *just war* and the Westphalian concept (non-intervention) is that a state is responsible for its own affairs as long as those affairs are within the limits of international law.⁵⁷⁹ *Just war* theory thus places an emphasis on legitimacy over legality which poses problems with the enforcement of the principles of international law. There is extensive literature on just war theory and state sovereignty. Michael Walzer provides the most contemporary discussion on non-intervention as the

⁵⁷⁴ Bellamy 2010:145.

⁵⁷⁵ Besson 2014:36 and 39.

⁵⁷⁶ Wheeler and Bellamy 2008:522.

⁵⁷⁷ Malanczuk 1997; Chesterman 2002.

⁵⁷⁸ One of the classic statements for intervention in the affairs of another state is found in John Stuart Mill’s essay, *A Few Words on Non-Intervention* (1859).

⁵⁷⁹ Malanczuk 1997; Shaw 2008.

moral integrity of the state. Citing that the acceptance of intervention as only permissible when the state violates humanity's morals.⁵⁸⁰ Chesterman's argument on sovereignty corroborates Walzer's position. Chesterman argues that principles of sovereignty and non-intervention reject the right of humanitarian intervention.⁵⁸¹ This is central to the thesis argument in its attempt to understand the complexities associated with international legal principles and a state's legal responsibilities when forming policy concerning concepts of sovereignty and intervention.

The concept of state sovereignty was also to a certain extent one of the main considerations when the United Nations Charter came into force and is considered a codified normative principle of international law.⁵⁸² At the same time, the United Nations Charter prohibits resorting to war or using armed forces in order to resolve disputes through the principle of non-intervention.⁵⁸³ The principle of non-intervention is an outcome of this basic principle of sovereignty.⁵⁸⁴

Krasner writes that it is assumed that no other power can intervene legitimately in the internal affairs of a sovereign state as it is the ultimate

⁵⁸⁰ Walzer 1977:107.

⁵⁸¹ Chesterman 2002:300-301; Chesterman 2001.

⁵⁸² Jean Bodin was the first theorist to formulate a modern concept of sovereignty. Bodin, Jean 1962:A98-99.

⁵⁸³ United Nations Charter Article 2, paragraph 7 (Evans 2006).

⁵⁸⁴ The definition of sovereignty is, in part, "the supreme political authority of an independent state" and sovereign power is defined as "the power to make and enforce laws". See, *Black's Law Dictionary, 7th Edition* 1996:1401-1402; Thakur 2002:324. It should be noted however that non-intervention is not the same as neutrality when gross violations of human rights are at issue.

authority within any international or state's political system.⁵⁸⁵ This assumption of authority within political systems brings to the foreground the contradictions inherent in the concept on use of force and sovereignty - intervention and non-intervention for humanitarian concerns. Contradictions primarily due to the confusion created by the right to intervene and the duty to intervene. As a result, this only positions further debate as to whether states have a legal right to act or do they have a moral obligation to act to maintain international peace and security.⁵⁸⁶

Since most claims in international law must be made by a state this contradiction only presents larger limitations in legalizing moral standards for intervention at the international level. This supports the constructive theory of the international system as anarchic, an assumption then mitigated by its subsequent dependency upon the state as an enforcement mechanism which is of importance when thinking of hierarchical political systems, as this study discusses.

As a consequence this contradiction - between intervention that ensures respect for fundamental human rights and the principle of sovereign non-

⁵⁸⁵ Krasner also discusses the complex nature of sovereignty with a focus on "Westphalian sovereignty" and "international legal sovereignty" Krasner 1999:20-25; see also *Pennoy v. Neff*, 95 U.S. 714 (1877) and Boutros-Ghali's 2000 *Agenda for Peace* which states absolute sovereignty never matched reality.

⁵⁸⁶ Carla Bagnoli 'Humanitarian Intervention as a Perfect Duty' in Terry Nardin & Melissa S. Williams (eds) *Humanitarian Intervention* New York University Press 2006; ICISS Report 2001.

intervention - underlies the debate on humanitarian intervention.⁵⁸⁷ A contradiction the United Nations Charter itself highlights, as evidenced in Article 1(1) the maintenance of peace and security and Articles 2(4) on the prohibition of use of force and 2(7) non-intervention in the domestic affairs of other states.⁵⁸⁸ When this confusion occurs, it becomes difficult to separate humanitarian motives from political motives, such was the case in Rwanda with regard to France's sphere of influence (*pré carré*) status.⁵⁸⁹ Although sovereignty and non-intervention are considered fundamental principles of the international system, intervention by external powers in the affairs of other states is now more than likely to occur during intra-state conflicts to remedy human rights abuses. This is evidenced in the interventions in Iraq (1991 and 2003), Somalia (1992), Libya (2011), as well as the inadequate response to the genocide in Rwanda (1994) and more recently Syria.

Furthermore, in practice, because of humanitarian emergencies, intervention mandates may be provided retroactively. For instance, France's intervention in Côte d'Ivoire was made initially without a United Nations' mandate.⁵⁹⁰ While it can be assumed that this "clearly challenges the central tenets of the international system and international law: the sovereign integrity of the state and non-interference into

⁵⁸⁷ See for instance, Bellamy 2006, 2009, 2010, 2011; Deng 1996, 2010; Evans 2001, 2008; Heinze 2011; Heir 2009, 2010; Luck 2009, 2010; Moses 2013; Newman, E. 2002; Newman, M. 2009; Pattison 2010; Thakur 2002, 2004; Wheeler 2000.

⁵⁸⁸ Charter of the United Nations in Evans 2005.

⁵⁸⁹ Touati 2007.

⁵⁹⁰ Opération Licorne, under the *Opération des Nations Unies en Côte d'Ivoire*, UNOCI (S/RES/1528 (2004)).

domestic jurisdiction.”⁵⁹¹ These precedents are not necessarily helpful if they are not saving lives and demonstrate further that the balance between respect for state sovereignty and humanitarian concerns has still not been found.

These criticisms lead directly to the argument that “humanitarian intervention rests on the notion that the principle of self-determination is negated when a genocidal regime does not have the consent of the people, so the legal principle of non-intervention does not apply”.⁵⁹² This includes the perception that humanitarian intervention is a counterbalance to some degree against unilateral abuses of state sovereignty.⁵⁹³

Francis Abiew has long argued that as long as there is “an overriding humanitarian motive ... considerations of national interest should not of themselves, render illegal or illegitimate an armed intervention so long as the motive for the action is the protection of the most fundamental human rights”.⁵⁹⁴ This rationale corresponds to Tesón who writes “human values, not state values, are integral to the debate on what action is justifiable in the event of a humanitarian crisis.”⁵⁹⁵ In that a state loses its sovereignty when it fails to protect its citizens.⁵⁹⁶ Besson concurs

⁵⁹¹ Newman 2001:244.

⁵⁹² Donnelly 1989, 2007; as well as Bellamy 2006; Francis Abiew 1999; Tesón 2006.

⁵⁹³ Bellamy 2006:33.

⁵⁹⁴ Francis Abiew 1999 80

⁵⁹⁵ Tesón 2006:2; 1988.

⁵⁹⁶ Tesón 2003:93. See also Thakur and Weiss (2009:27) who contend that the authority of the state has never been written exclusively as absolute; Newman (2002) who discusses the implications of humanitarian intervention for state sovereignty

when she argues that the justification for human rights “should not be conflated with the object of human rights but often is ... [We should] understand human rights as a justification of rights, and of legal and moral rights at the same time ... as embedded in the legal practice of human rights.”⁵⁹⁷

It is questionable whether it is actually possible to engage in a humanitarian action to rescue individuals being abused by a genocidal regime without engaging in military force of some type. As the interventions in Iraq, Somalia and Rwanda as well as the recent crisis in Syria reveal, more often than not, it is difficult to preserve the credibility of the state and international systems in addressing humanitarian crises without resorting to the use of force. Since inaction or reluctant intervention not only achieves very little but proves to be detrimental to those in the abusive situation. In this sense it could be argued that the Security Council’s inability to act in Rwanda or Syria, amongst other violent conflicts, represents a more serious threat to the principle of human rights than its lack of action in Kosovo which was later ruled a humanitarian necessity.⁵⁹⁸ This casts doubt on the United Nations Charter as a legal framework for humanitarian intervention. These doubts are not new, they began to surface as early as 1958 when Bowett and Brownlie asserted that the use of force when used to rescue abused

⁵⁹⁷ Besson 2014:36 and 39.

⁵⁹⁸ Moses 2013:127-28; Hurd 2011:301.

or threatened individuals does not violate a state's sovereignty and is, as such, legal.⁵⁹⁹

Suffice it to say that currently any argument about absolute sovereignty⁶⁰⁰ will prove to be limited when it relates to humanitarian intervention in the face of human rights abuse since human rights are in some sense binding to the state, and compel both domestic and international attention. If nothing else, it is obvious that the principle of sovereignty no longer affords protection to failed states that grossly abuse their citizens. From a legal perspective this limitation on the principle of non-intervention provides a clear development toward the changed scope of state sovereignty with regard to the state and human rights abuses.⁶⁰¹

The Danish Institute Report on Human Rights ("The Danish Report" 1999) and the Responsibility to Protect Doctrine ("R2P" ICISS 2001) were established to move beyond the lack of consensus concerning

⁵⁹⁹ Bowett 1958:150-153; Brownlie 1963:265-270. Bowett and Brownlie maintain that the statement 'against the territorial integrity or political independence of any state' is a qualification (ibid). Brownlie has furthered argued that "the conclusion warranted by the *travaux préparatoires* was not intended to be restrictive. On the contrary, it was to give more specific guarantees to small states and it, therefore, cannot be interpreted as having a qualifying effect" (Brownlie 1993). See also Francis Abiew 1999 62 n2 which supports this statement.

⁶⁰⁰ As defined in the Introduction, sovereignty is the primary actor in the international system. The concept of state sovereignty is one of the defining principles of international law under both the United Nations Charter and customary international law Evans 2006:9; Kelly 2000; Francis Hinsley *Sovereignty* London Basic Books 1966: 126; Michael Reisman 'Sovereignty and Human Rights' (1990) *Contemporary International Law* 84 Am. J. Int'l L. 867.

⁶⁰¹ "Reservations can have the effect of excluding altogether the legal effect of a particular provision, or modifying the extent of a provision" Dixon & McCorquodale 2003:73. Although of note is the fact that a further problem lies wherein states have made reservations to human rights agreements.

humanitarian intervention.⁶⁰² The Report was challenged because it attempted to establish from a practical perspective that “states may need more than humanitarian motives to be willing to intervene in a substantial way.”⁶⁰³ Its opponents argued that, in effect, it constituted a dismissal of other cultures or alternative political systems; ‘which consequently are seen as having insignificant value and neglect the conflicts that are forgotten by the media.’⁶⁰⁴ Such criticisms would, at times, appear relevant given that intervention efforts occurred in Somalia and Rwanda in order to remedy situations of fundamental human rights abuses committed by a state against its own people of which the consequences of those interventions caused further insecurity due to their failure.⁶⁰⁵

R2P was developed in an effort to “reconceptualise the humanitarian intervention debate in the wake of the 1999 Kosovo crisis.”⁶⁰⁶ It was an attempt to reconcile the tension between sovereignty and human rights proposed by Francis Deng and Roberta Cohen through their work with internally displaced persons (IDP).⁶⁰⁷ The concept for R2P as an emerging norm was reified in several established international legal

⁶⁰² ICISS Report 2011.

⁶⁰³ Danish Institute Report 1999:111.

⁶⁰⁴ Krasner 2001; Taylor B. Seybold *Humanitarian Military Intervention: The Conditions for Success and Failure* Oxford University Press 2007; Martha Finnemore *The Purpose of Intervention: Changing Beliefs about the Use of Force* Cornell University Press 2003.

⁶⁰⁵ Heinze 2011; Pattison 2010.

⁶⁰⁶ Bellamy and Williams 2009:118, Hehir 2009

⁶⁰⁷ Alex J. Bellamy *Responsibility to Protect: The Global Effort to End Mass Atrocities* Polity Press 2009:21.

provisions, including Article 24 of the Charter.⁶⁰⁸ The viability of R2P is outlined in the ICISS Report (2001) and includes three responsible elements: prevent, react and rebuild. By creating standard benchmarks the ICISS assumed that once states were given factual evidence of human rights violations a cohesive conclusion would be reached by the international community.

To the contrary, cohesion did not happen because R2P reproduces the same contradictions that promulgated the need for intervention in the first place.⁶⁰⁹ The failure to incorporate specific criteria into the Document created weak dialogue that held the potential to adversely affect the legitimacy of humanitarian intervention decisions. Particularly as humanitarian decisions will only gain legitimacy from clear and foreseeable legal standards.⁶¹⁰

As a result, in 2009 following the 2005 World Summit, the UN Secretary General issued a report on the implementation of R2P identifying state obligations under R2P.⁶¹¹ Gareth Evans commented that the justification used for the rationale behind the responsibility to protect language was

⁶⁰⁸Other documents include: the Universal Declaration on Human Rights, the Convention on the Prevention and Punishment of Genocide, the Covenant on Civil and Political Rights, and Covenant on Economic, Social, and Cultural Rights, and the Geneva Conventions which bans torture ICISS Report 2001:14, 33.

⁶⁰⁹ The literature on humanitarian intervention is extensive. See for instance, Bellamy 2006, 2009, 2010, 2011; Deng 1996, 2010; Evans 2001, 2008; Heinze 2011; Heir 2009, 2010; Luck 2009, 2010; Moses 2013; Newman, E. 2002; Newman, M. 2009; Pattison 2010; Thakur 2002, 2004; Wheeler 2000.

⁶¹⁰ David Chandler 'R2P or Not R2P? More Statebuilding, Less Responsibility (2010) 2 *Global Responsibility to Protect* 161; Gareth Evans 'Responsibility to Protect: An Idea Whose Time has Come...and Gone?' (2008a) 22(3) *International Relations* 283.

⁶¹¹ The World Summit Outcome Document endorsed the R2P doctrine in paragraphs 138 and 139 (Evans 2009:20).

its capability of producing a response to extreme human rights abuses that the ‘right to intervene’ language could not.⁶¹² The change in language placed the focus on the protection of human rights (i.e. human security). In doing so the focus shifted from traditional security concepts which made it difficult to justify intervention in conflict affected states, to the people affected by the conflict.⁶¹³ Yet there was still nothing in the Document that established criteria for when humanitarian intervention is appropriate and/or necessary.

R2P was then “perceived ... to create a new norm that would eventually ‘legalize’ humanitarian intervention”.⁶¹⁴ That the extent to which humanitarian intervention is allowed and legitimized is due to the nature and strength of a norm permitting humanitarian intervention.⁶¹⁵ Yet the protection of human rights is contentious because states and the international community will translate protection according to their applicable mandates. Consequently the moral justifications of human rights will differ significantly depending on how a state translates what it will perceive as its moral obligation.

While some states may be willing to intervene to stop atrocities, the international system is reluctant to establish a norm that involves protection under the responsibility to react which may or may not

⁶¹² Evans 2008:294, Newman 2002:108.

⁶¹³ Williams 2008, Ramsbotham 2005, Krause and Williams 1996, Hehir 2011.

⁶¹⁴ Newman D. 2009:92

⁶¹⁵ Finnemore 1996; Wheeler 2001.

involve the use of force.⁶¹⁶ In reality, it reinforces the divide between the implementation of international norms and how to implement those norms by means of the state.⁶¹⁷ This has serious implications for the success of R2P. While there may be justifiable benchmarks for humanitarian intervention, in effect the fundamental concern is to what extent has R2P contributed to the resolution of intra-state violence for humanitarian needs? Moreover, the international community will be unable to determine if success has been met if there are no parameters specified to measure success. This would imply that in certain aspects, R2P has not been institutional designed to promote consistent standard practice. Although this question is not specifically addressed within the thesis it does illustrate the thesis' position that that the interpretation of international principles at the domestic level, together with state interest, is crucial for effective legality from within the state. And as such lends legitimacy to intervention and/or non-intervention decisions.

Edward Luck has argued that “the strength of R2P lies in its limits, its application. There is a meaningful threshold that warrants intervention and agreement on that threshold as the UN helps to ensure a considerable degree of consensus and legitimacy.”⁶¹⁸ Inasmuch as Luck's argument may clarify and establish inferred standards for humanitarian intervention, it cannot refer to indeterminable legal obligations. He can

⁶¹⁶ Eric A. Heinze 'Humanitarian Intervention, the Responsibility to Protect, and Confused Legitimacy' 2011 [online].

⁶¹⁷ Heinze 2011 [online].

⁶¹⁸ Luck 2011. Jeremy Moses argues from a realist perspective that R2P is “purely normative (*de jure*) and *de facto* power is largely absent” Moses 2013:125, 1199-125.

only reflect upon the legal obligations and as such does not establish any form of legal precedent. This is because his argument neither explicitly creates nor alters any such legal obligations as to how those standards apply, particular with regard to the elements obliging the international community to respond to mass atrocities. [Luck does not address this, his argument advances there is no need to.]

Moreover, Luck's argument is situated in the systemic level of law, not in the domestic level of law. Therefore, can R2P be considered a norm if individual state practice is not associated with the legal implications of intervention for the existence of a norm. Until a consensus can be reached concerning the obligations of R2P, when it should be invoked and by whose authority it should be invoked, it cannot be considered a norm nor can it be considered legally obligatory.⁶¹⁹

Despite the moral philosophy underlying the concept of intervention the question still remains as to how a legal right of humanitarian intervention translates into practice given that there are certain legal threshold conditions which must be met relative to human suffering. Therefore, if intervention, by any definition, involves the *intrusion* of force onto another state, the focus must be on the degree to which the state's legality of foreign policy makes use of international law to establish a

⁶¹⁹ Contrary to this position, McDougall and Reisman (1969:444) discuss customary international law's ability to transform to meet societal needs. However, Chesterman (2001) argues that customary international law authorises humanitarian intervention without UN Security Council approval; while and Nussbaum (2011) argues that much humanitarian policy today violates basic human values.

legitimate basis for humanitarian intervention to regulate its behaviour within a third state or issue area.

Subsequently this thesis explores where humanitarian intervention, as a legitimate practice, and its interests interact with a state's domestic law and interests in the formation of foreign policy that lead states to intervene. This interaction will ultimately determine the course of a state's foreign policy, especially since decision-makers have a tendency to look for and perceive factors that support their decisions.⁶²⁰

According to this legal framework, decision-makers respond in a given manner not based on what is happening in the international environment, but rather from what they perceive the legality of the situation to be inasmuch as human rights "cannot provide justification external to the law".⁶²¹ This is in accordance with the findings of this thesis. Furthermore, as stated earlier, no one has yet addressed the issues surrounding transference of legal authority from the state to the international level.

As the empirical cases will show, what decisions-makers perceive from a situation, as well as state laws and interest, influences the decision-making process more than the situation itself. To make a determination of the situation it is necessary to first identify the principles represented

⁶²⁰ Jervis points out the tendency of decision-makers to perceive events and interpret incoming information in light of their immediate concerns (Robert Jervis *Perception and Misperception in International Politics* Princeton University Press 1976:chapter 5).

⁶²¹ Besson 2014:38.

by the humanitarian situation and then determine how these legal principles are to be interpreted for justification into practice. Inasmuch as every decision requires interpretation of the facts presented, the perception of the decision-makers generally addresses two issues: information received at both the international and domestic level, and which information received is relevant to the decision and which is not. Accordingly, either a decision to use force for the protection of human rights or a decision to not intervene will be put forth. As set out in chapter one, while states may agree upon which international principles to use in decision-making relating to humanitarian intervention, the application is always open to interpretation, because effectiveness rests upon interpretation.⁶²²

As a result, the [moral] justification and rationale behind the framing of policy decisions stems from the differences in information and the interpretation of the information provided, including use of humanitarian language or the absence of such language, in the application process relevant to each conflict.⁶²³ It will therefore be necessary for the interpretation of the international principle, together with state interest, to meet the criteria of effective legality from within the relevant state. Decision-makers will therefore be aware of the necessity to interpret international principles that will afford legitimacy to their decisions in certain situations. This is evident in the case of Somalia, where human

⁶²² See Tesón's 2005 argument in 'Ending Tyranny in Iraq' and Lillich (1994).

⁶²³ "The language of rights has a moral resonance that makes it hard to avoid in contemporary political discourse" (Nussbaum 1997:273).

rights violations were interpreted as a threat to international peace and security and a Chapter 7 intervention was authorized for explicitly humanitarian purposes.⁶²⁴ Yet, in Rwanda although France's general foreign policy approach was considered one of intervention at the time, intervention was based upon President Mitterrand's personal relationship with Rwanda and not on the human rights violations.⁶²⁵ It was further shaped by bilateral cooperation and defence agreements between the two countries.⁶²⁶

Therefore, since use of force in humanitarian intervention is a fundamentally domestic political decision, as is non-intervention, the way the facts are interpreted and the arguments are presented will have an impact in the decision-making process, especially when intervention is linked to human rights. Indeed, although the international system (i.e., the United Nations) allows for the possibility of intervention, the scope of intervention is not determined by international law alone but by a pattern of interactions between the international system and a state's domestic legal institutions to effect humanitarian concerns.

Consequently, the conduct of states will differ from the expectations of the international system due to limitations which are inherent features of any state and which cannot be overcome at the international level.⁶²⁷

Which as this thesis asserts is based upon the way law is created within

⁶²⁴ Lofland 2002:56.

⁶²⁵ *Jeune Afrique L'Intelligent*, n° 2322 du 10 au 16 juillet 2005.

⁶²⁶ Touati 2007; Krief 2006.

⁶²⁷ Monateri 2012; Beasley 2013; Lasser 2004; Neack 2003; Germain 2003; Glendon, Gordon & Osakwe 1994.

each state, as well as sources of law which lends legitimacy to state actions. Therefore, while systemic pressures may create an agenda of reference for decision-makers (humanitarian situations position international rules/norms in the domestic legal framework) to explain foreign policy,⁶²⁸ these systemic pressures cannot assure relevance similar to a sovereign state's legal-political structures.

This again brings to the foreground the question of how states will interpret rules of international law as well as the role which international law plays in the domestic process during the course of foreign policy, because perceptions relevant to security and the moral issues associated with human rights are integral to, rather than independent of, foreign policy behaviour. This gives identity to humanitarian crises by determining which humanitarian crisis warrants a response and how that response will be received since, as noted above, how a decision-maker perceives a situation will generally have more influence on foreign policy than the situation itself.

Therefore if a legitimate exception to the principle of non-intervention rests upon the interpretation of humanitarian concerns, then the causal factors that influence the decision-making process, in large part, depend upon a state's interpretation of a principle of international law that involves the simultaneous application of laws on the use of force and attention to human rights. Since humanitarian intervention's dependency

⁶²⁸ Lobell, Ripsman and Taliaferro 2009:19.

compels not only a moral duty upon states to intervene but also a legal duty per se within the jurisdiction of the state, interpretation is required to bridge the gap between international rules, the domestic legal-political framework, and the situations to which those rules apply.⁶²⁹

Since foreign policy adhering to international law must be political to have influence, some degree of legal effectiveness is required. In addition because policy decisions are considered equal to law, those decisions must be accompanied by some legal obligation or recognition about how authority is constituted and maintained within a state.⁶³⁰ The state therefore by using its domestic legal and political structures as a mechanism for international authority, allows for structures of hierarchy otherwise absent in the international system. This analytic/problem-solving point of view would consequently address the issue concerning the transference of legal authority from the state to the international level.⁶³¹

7. b. The Distinction between Legality and Legitimacy of Actions

The purpose of this section is to clarify the distinction between legality and legitimacy. When and how to intervene are directly linked to the

⁶²⁹ A relevant issue then becomes, how do we know that one interpretation rather than another is in accordance with the rule if the rule itself cannot determine its own correct application and whom then establishes legitimacy. See Nussbaum 1997:290-292.

⁶³⁰ Forsythe 1990 xiii; Westra 2017:1; Most & Starr 1984:386; Slaughter, Tulumello and Wood 1998:369.

⁶³¹ Accordingly, "the rule of recognition is a customary rule of the most authoritative official law-applying organ ... [and] constitutes the normative content of the official legal order". Raz 1970:6.

legality and legitimacy of actions which are generically criss-crossed by the interplay between law and policy.

Although both terms are used frequently when discussing humanitarian intervention, very little attention is actually given to what the terms mean or how they work. Nor has anyone noted the persistent gap between legality and legitimacy which is rooted in the disconnect between the international rules that attempt to govern conflict situations. This is quite relevant because this disparity is the foundation for the lack of consensus that causes humanitarian intervention to rather ironically exacerbate conflict rather than diffuse it.

While it is easy enough to deduce that legality relates to the lawfulness of a rule, there is no model of legitimacy that provides for the effectiveness of international law within the decision-making process. Although there is evidence that decision-makers take the power of international legitimacy seriously,⁶³² the concept itself rarely receives attention in an analysis of a state's established normative structure of rules, despite international legal obligations that may be created. Consideration of the interaction between a state's established normative structure of rules and humanitarian intervention was particularly true in the early 1990s when there were no formal policy guidelines or mechanisms for humanitarian intervention decisions in place at either the international or state level.

⁶³² As evidenced in the 1991 Gulf War, Somalia in 1992 and the 2003 Iraq War (Hurd 1999:379).

Accordingly, this section performs two tasks. First it will distinguish between the legality and legitimacy of actions for humanitarian intervention. It then focuses on the case of the NATO intervention in Kosovo in 1999, the recent crisis in Syria and the debates stemming from the United Nations Charter. Discussing the complications that arose with Kosovo in defining legality and legitimacy in decisions to intervene with force or not. This draws particularly attention to legitimacy concerns and how these concerns may dominate other considerations in the decision-making process as a reason for reluctance to undertake an intervention with force, such as was the case in Rwanda, which reads directly into the empirical studies of this thesis. Finally, as an example of the legality-legitimacy dilemma regarding the legal standardisation for the use of force necessitated by humanitarian intervention, this section discusses the quagmire underscoring Kosovo's continuing legacy and the lack of international enforcement mechanisms which continue to complicate intervention decisions and illustrates the importance of the legal and theoretical assertions of this thesis.

Legality and Legitimacy

The interpretation of humanitarian crises as threats to international peace and security reveals the intricate link between legality and legitimacy. Although legality and legitimacy are often considered synonymous, a distinction can be made between the legality and the legitimacy of humanitarian intervention. This needs to be addressed given that the

scope of humanitarian intervention must operate within the law to establish legality, despite the international legal obligations that may be created.

Legality is about the lawfulness of a rule, its duties and its obligations, “whether and under what conditions international law [or domestic law] authorizes such actions.”⁶³³ Legitimacy has to do with justification of the rule, its ability to conform to or act in accordance with said established rules, standards or principles and “the normative status of humanitarian intervention as an instrument of international justice.”⁶³⁴ Legitimacy is what gives a state’s government its moral authority and the standards for that legitimacy are grounded in the law.⁶³⁵ However the law is only the beginning, because public perceptions of legitimacy are also shaped by moral standards and values derived from legal traditions.⁶³⁶ These standards of legitimacy reflect cultural values and define public perceptions of what is right and proper for a state including limits on the use of force and are the measure of legal and political legitimacy.

Consequently Chesterman and Slaughter contend legitimacy is the reason legal rules are obeyed, both domestically and internationally. There are procedural as well as substantive reasons; that is to say, the

⁶³³ Holzgrefe 2003:18; Brunnée & Toope 2010.

⁶³⁴ Holzgrefe 2003; Coleman 2007:27, writes that “legitimacy is a public judgment according to public rules”.

⁶³⁵ Ibid.

⁶³⁶ Friedman 1975:22; Monateri 2012.

ideas which support the notion that rules must be regarded.⁶³⁷ For instance, humanitarian intervention becomes a legal and legitimate action in international law as well as an action in foreign policy by process of domestic institutions. For the purpose of this research, legitimacy is also a subjective quality, relational between actor and institution, and is defined by the actor's perception of its legal and political institutions.⁶³⁸ Institutions as defined in the Introduction of this Thesis are the rules and codes for governing that produce foreign policy.

Tucker and Hendrickson expand on the differences between legality and legitimacy:

[L]egitimacy arises from the conviction that state action proceeds within the ambit of law, in two senses: first, that action issues from rightful authority, that is, from the political institutions authorized to take it; and second, that it does not violate a legal or moral norm. Ultimately, however, legitimacy is rooted in opinion, and thus actions that are unlawful in either of these senses may, in principle, still be deemed legitimate. Despite these vagaries, there can be no doubt that legitimacy is a vital thing to have, and illegitimacy a condition devoutly to be avoided.⁶³⁹

As discussed previously,⁶⁴⁰ contemporary legal debates about humanitarian intervention typically begin and end with the Charter of the United Nations. Article 2.4 prohibits the threat or use of force against another state, thus restricting *jus as bellum* as a customary right to war held by sovereign states. Various debates on intervention and numerous international legal instruments treat the United Nations Charter's ban on the use of force in absolute terms except where authorized by the Charter

⁶³⁷ Chesterman 2002:293-307; Slaughter 2011:3-15.

⁶³⁸ Brownlie 1963:265-270; see Henkin 1995:9-10; Brunnée & Toope 2010.

⁶³⁹ Tucker and Hendrickson 2004:18-32,18.

⁶⁴⁰ Echoes of the Past – the Basic Principles, Thesis:160-162.

itself.⁶⁴¹ The doctrine of R2P reasserts this authorization under the guise of the Security Council.⁶⁴²

Non-intervention, the Inability to Act

Under the Security Council criterion the ICISS Report (2001 “R2P”) attempts to justify the breach of the norm of non-intervention. There is an ambiguity however. R2P may offer language that emphasizes the role of the international system in aiding states to comply with citizen responsibility but R2P says nothing about the international system’s failure to intervene.⁶⁴³ This is disconcerting because the failure to intervene is central to critical discussions of human rights protection. Non-intervention is “presumably as politically powerful as the practice of intervention, and must somehow be accommodated into the argument.”⁶⁴⁴

Non-intervention is not the same as neutrality however when gross violations of human rights are at issue. Neutrality does not provide human rights protection. It condones human rights violations by perceiving human rights from a subjective position instead of its objective variances.⁶⁴⁵ Yet the question of whether this is sufficient to address challenges which arise out of the disparity between humanitarian

⁶⁴¹ Brownlie 1963:265-270; Bagnoli 2006:117; The United Nations Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty, G.A. Res. 2131 (Xxx) 20 UN GAOR Supp. (No. 14); UN Doc.A/6014, 1965; UN Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States, G.A. Res. 2625, 25 UN GAOR, Supp. (No. 28) at 121, UN Doc. A/8028, 1970, amongst others [online].

⁶⁴² ICISS Report 2001:33.

⁶⁴³ ICISS Report 2001.

⁶⁴⁴ Williams and Bellamy 2005.

⁶⁴⁵ Ibid., see also Bagnoli 2006; Hoover 2013; Goodhart 2014.

intervention and state sovereignty is another concern that remains unresolved. It is likely to remain unresolved pursuant to Switzerland's apathy following the recent ruling of the European Court of Human Rights denying the genocide of the Armenian people which subsequently affects Switzerland's Swiss-Armenian citizens.⁶⁴⁶

It should also be noted that Article 2.4 is not an absolute prohibition against the use of force. It is simply a general prohibition, allowing exceptions in certain circumstances.⁶⁴⁷ These exceptions can be found for instance within Chapter 7 of the UN Charter which discusses collective operations, Article 51, self-defence and Article 53 discusses measures taken against enemy states, all of which include permissible use of force.⁶⁴⁸ Because of these exceptions Ferencz & Perkovich have argued "that once the right of self-defence is conceded Article 2.4 can no longer be regarded as an absolute prohibition of the use of force and that it is consequently a matter of interpretation whether other situations merit an exception to the rule."⁶⁴⁹ This absolute view was held with regard to sovereignty but the absolute principle regarding sovereignty

⁶⁴⁶ The *Newswire* brings to the forefront neutrality issues surrounding the Swiss government following the European Court of Human Rights 17 December 2013 ruling in *Perincek v. Suisse* on the genocide in denial of the genocide of the Armenian people and Switzerland's failure to appeal the ruling (Bern, *PRNewswire* 2014) .

⁶⁴⁷ Brownlie 1963:265-270; Bagnoli 2006:117.

⁶⁴⁸ The United Nations Charter in Evans 2006.

⁶⁴⁹ Ferencz & Perkovich 2006:43, 95; Bowett 1958:152 argues that if the drafters intended the prohibition on use of force to be absolute it would have been banned completely. Several writers are in agreement with Bowett: Edward Gordon, *Article 2 (4) in Historical Context* 1985 10 Yale J. Int'l L. 270, 275; Ian Brownlie, *International Law and the Use of Force* Clarendon Press 1963, 267; see also Rosalyn Higgins, *The development of International Law through the Political Organs of the United Nations* Oxford University Press, 1963, 183.

has foregone necessary changes to meet current societal needs as outlined earlier in this chapter.

In addition, while provisions within the Charter create a framework for international law wherein the use of force ought to be applied only as a last resort, international law has yet to establish any mechanism or procedure which has the capacity to direct this process.⁶⁵⁰ In other words, there is no set precedent, for instance as with the *Caroline* case,⁶⁵¹ for the legal standardization of the use of force for the necessity of humanitarian intervention.

As a consequence, while the right to intervene has been established, it has not been mandated. The guidelines established by R2P are not rules on intervention and are therefore not state compulsory. As a result, the right to authorize intervention with force continues to be a key point of debate⁶⁵² and is as problematic now as in the 1990's when there were no legal guidelines or legal mechanisms in place.

Kosovo and Syria - Between Legitimacy and Legality

This interplay between the concepts of legality and legitimacy was illustrated best when in 2000 the Independent International Commission on Kosovo established by the UN Security Council, concluded, amongst

⁶⁵⁰ Thesis:180-183.

⁶⁵¹ The *Caroline* case of 1837 effectively instituted a legal mechanism and established the principles of necessity and proportionality for pre-emptive use of force pursuant to customary international law. 12 *Tul.J. Int'l & Comp. L* 117,129 [online].

⁶⁵² Jeremy Moses 2013:127-28, argues that the right to authorize intervention continues to be a key point of debate and cites Kosovo and the 2003 Iraq invasion as examples; also see Tesón 2003.

its findings, that the NATO action in Kosovo was not legal, but that it was legitimate.⁶⁵³ Intervention was justified due to humanitarian necessity.⁶⁵⁴ This was a crucial ruling and points to a continuously challenging dilemma that the international community faces in responding to security threats, in that it re-established the inconsistency between legality and legitimacy of actions.

Falk and Franck, amongst other authors, wrote opposing points of view following the Kosovo decision. Falk stated that the “Kosovo dilemma *disclosed an undesirable gap* between legitimacy and legality. Whereas Franck, when evaluating the work of the Independent International Commission on Kosovo, stated that it was a contribution *towards bridging the gap...between legality and legitimacy* (italics added).⁶⁵⁵ An obvious criticism to these arguments, made by this research, of course, is that their opposing comments not only challenge but further illustrate the inconsistency between legitimacy and legality. This only serves to reinstate the fundamental problems of humanitarian intervention during the 1990s and one which continues today.

⁶⁵³ Hurd 2011:301; For recent discussion on Kosovo and the ICJ opinion: see Ivan Vejvoda (3 August 2010) “Kosovo: The UN Court Has Spoken, let the Dialogue Begin” [online]; Bellamy 2016; Moses 2013 (amongst others).

⁶⁵⁴ In acknowledgment of the Kosovo decision Kofi Annan said, “emerging slowly, but I believe surely, is an international norm against the violent repression of minorities that will and must take precedence over concerns of State sovereignty” (United Nations Press Release, SG/SM/6949-HR/CN/898).

⁶⁵⁵ Franck 2002:182. “Franck’s work on legitimacy attempted to explain how international law influences international actors” (Brunnée & Toope 2012:18). For recent discussion on Kosovo and the ICJ opinion: see Vejvoda 2010 [online]; Bellamy 2016; Moses 2013.

Although Tucker, Hendrickson and the Kosovo decision attempt to distinguish between legality and legitimacy this distinction neither identifies nor attempts to remedy the disparity brought about by the disconnect between the international rules that attempt to govern conflict situations.⁶⁵⁶ In other words, any distinction that has been made between legality and legitimacy does not reconcile the inconsistency.

The key issue here is that the result of Kosovo decision alludes to the position that legitimacy is more important than legality in the international arena when it comes to use of force for intervention purposes. In effect, this seemingly gives plausibility to the balance between what is legal and what is legitimate. During the 1990s there were no formal legal guidelines in place, the legitimacy of the use of force relied upon standards of legality. The Kosovo decision however has reversed this legal standard and put forth the use of force as “implicitly legalized by international law.”⁶⁵⁷

“[W]hen a nation seeks to justify its action by asserting that international law is or ought to be something else, the justification in effect admits violation, especially when the nation cannot reasonably expect that its ‘proposed norm’ would be acceptable.”⁶⁵⁸ This is evidenced in this study’s empirical chapters. Interventions undertaken by France in Africa contain legitimacy problems because of its colonial past, whereas legitimacy problems concerning the United States in Africa are based

⁶⁵⁶ Tucker and Hendrickson 2004.

⁶⁵⁷ Hurd 2007.

⁶⁵⁸ Henkin 1979:43.

upon its controversial interventions record. It is easy to conclude that the distinction between legality and legitimacy on concerns whether to intervene with force or not was to become a debate on the role of the state regarding international law because the legacy of Kosovo is that it does not actually establish precedent.⁶⁵⁹ This is witnessed in the 2003 Iraq invasion where even now it is argued that the invasion was legal since authorization was implied but not legitimate because evidence did not substantiate the laws relied upon.⁶⁶⁰

This dilemma was one of the rationales behind the development of the R2P doctrine.⁶⁶¹ It was developed as an operating principle in an attempt to reconcile this disparity but still questions focus on the legality and legitimacy of the doctrine's components, particularly legal grounds for the use of force. An example of which is the current civil unrest in Syria.

Wilson argues the Syrian humanitarian crisis only serves to promulgate the Kosovo legacy.⁶⁶² Arguments are ongoing about the legality and legitimacy for a use of force action in Syria without Security Council approval, with proponents citing Kosovo and the ongoing moral dilemma to prevent further civilian tragedy. Debate on the use of force in Syria centers on the responsibility to protect (R2P) in an attempt to increase

⁶⁵⁹ For further discussion on whether the 1999 intervention was precedent-forming see: Hehir 2009, 2010; Bellamy 2009 Chandler 2002; O'Connell 2000; Wheeler 2001.

⁶⁶⁰ For arguments on the humanitarian intervention in Iraq see Tesón 2005; Cushman 2005; Nardin 2005.

⁶⁶¹ ICISS Report 2001.

⁶⁶² Wilson (2013) "Credibility at Stake: Syria and the Kosovo Model"; Shinkman (2013) "Albright Draws on Kosovo Lessons for Syria Solution"; Karakatsanis (2015) "The Kosovo Airstrikes Precedent: A 'One-Size-Fits-All'?"

the pressure on the international community to act, but once again as in Kosovo, the Security Council is in deadlock; legally rendering the Council ineffective and unable to reconcile laws on the use of force and human rights.⁶⁶³

Admittedly, the deadlock does provide a cross check that serves the purpose it was designed for.⁶⁶⁴ Paradox aside, this deadlock does not support international guidelines instituted in legal doctrine, such as R2P, concerning the protection of civilians caught in protracted situations of intra-state violence. If anything the deadlock strengthens the disparity and substantive legal issues between the legality and legitimacy of humanitarian intervention and the international rules that attempt to govern intra-state conflict situations associated with an intervention. As a result, Syria illustrates that R2P's reliance on the legal framework of the United Nations may prove to be ineffective in its practical application since intervention decisions only obtain legitimacy from clear and predictable legal standards.⁶⁶⁵

The question then arises, who decides the need for a military humanitarian intervention in specific cases when the Security Council is unable to make a decision for use of force when humanitarian concerns arise in specific cases. How are the principles interpreted into practice to affect legality when cases of humanitarian concerns arise? Certainly

⁶⁶³ Tesón (2012) argues that for the purpose of protecting human rights the Security Council is dysfunctional. Also see Certo, 'Military Intervention in Syria Is the Problem, Not the Solution' in *Foreign Policy in Focus* (November 18, 2015).

⁶⁶⁴ Sarooshi 2000.

⁶⁶⁵ Williams, et al. 2012.

inaction into a humanitarian crisis would render Edwards Luck's rationale on UN assistance ensuring a considerable degree of consensus and legitimacy for human rights protection as arbitrary.⁶⁶⁶

There will always be different views and interpretations, as well as opposition, on when to intervene. The United Nations and its member states intervened in Somalia with Chapter 7 use of force operations (as well as Iraq, Bosnia, Haiti and more recently Libya) but not in Rwanda until genocide was shown as a feasible motive to intervene.⁶⁶⁷ This was after the United States, United Kingdom and France cast vetoes against intervention, supported by Rwanda who sat on the Security Council during the crisis.⁶⁶⁸ However, use of force concerning human rights abuses was overlooked in the Kosovo crisis, wherein NATO took military action without express authorization from the Security Council. Syria reiterates the quagmire associated with Kosovo and the lack of international enforcement mechanisms which continue to complicate intervention decisions.⁶⁶⁹ As a consequence, seventeen years after the Kosovo intervention we still question its effect on intervention decisions. Thus Kosovo misdirects the establishment of precedent for legal grounds involving laws on the use of force and the attention to human rights.⁶⁷⁰

⁶⁶⁶ Luck 2011.

⁶⁶⁷ Harbeson & Rothchild 2000; Schraeder 1994; Clapham 1998; Whitaker 1978; Kansteiner 2009.

⁶⁶⁸ Daniel Bourmaud 'France in Africa: African Politics and French Foreign Policy' (1995) no. 2 *Issues: A Journal of Opinion*, 23; 1993 Rapport de la Commission Internationale.

⁶⁶⁹ Hurd 2011:301; Vejvoda 2010 [online].

⁶⁷⁰ It was recently argued that Kosovo does not establish precedent, that instead "it was indeed an exception" (Steinke 2015:44). It did however significantly challenge the

It would appear that the substantive relationship between the legality and legitimacy of humanitarian intervention rests on the extent to which the rules (norms) of international law are interpreted within a state's legal framework and how the state constructs that legal principle within foreign policy to prevent or stop human rights abuses.⁶⁷¹ In any legal system issues of legal procedure and legal substance are involved as well as sources of law which are formed by relevant interest in any humanitarian situation.⁶⁷² As such legitimacy concerning the use of force in humanitarian intervention will reveal that there are established legal institutions, both international and domestic, that interact with the decision-making process in the framing of decisions that lead states to intervene.

As set out in chapter two and illustrated in the next section, in both France and the United States issues of legal procedure and legal substance are involved as well as the sources of state law which are formed by state interest. As such legitimacy concerning the use of force and protection of human rights will reveal that there are established legal institutions, both international and domestic, that interact with the decision-making process in the framing of foreign policy that lead states to intervene. Humanitarian issues become part of the interpretative practice of a state because such issues are ruled from within, through

limits of *jus ad bellum* (the rules of conflict/just war) and *jus in bello* (the rules of acceptable conduct) (Ibid. 328).

⁶⁷¹ Bagnoli (2006:133) "The legal form this duty should assume is a second order question of institutional design."

⁶⁷² Donnelly 1999:72; Friedman 1975:22; Monateri 2012.

interpretation, rather than outside. This allows the state through its legal and political structures to commit to the fixed limitations of legitimacy in the international legal system while affording some degree of authority.⁶⁷³

Summary

The need to reconcile intervention with the principle of sovereignty is a critical issue in any debate on humanitarian intervention, which evolved with the Peace of Westphalia and established the nation-state as the principle actor in international law. Despite inherent contradictions between the use of force and sovereignty, following the atrocities associated with two World Wars in the twentieth century components of sovereignty were set in humanitarian norms, such as the 1948 Universal Declaration of Human Rights.

Yet it was not until the post–Cold War world that gross violations of human rights were recognised by the international community as constituting threats to international peace and security. The balance between respect for state sovereignty and humanitarian concerns however had not been found. States were still unable to identify how these norms translated into practice when cases of humanitarian concerns arose. One explanation for this controversy was that there were no formal legal guidelines or legal mechanisms at the state level for humanitarian intervention decisions in place at the time. This problem

⁶⁷³ Brunnée & Toope 2012:1; Hart 1994, 1961; Marmor 2002; Marmor 2005.

was situated in the capacity of states to produce institutions at the domestic level capable of supporting humanitarian principles through the foreign policy process. The Danish Institute Report and Responsibility to Protect Doctrine were established after the intervention in Kosovo to move beyond this but the disparity by which humanitarian intervention becomes a legal and legitimate action in international law as well as in state policy persists.

This brings about the question of authority within a state's legal and political structures because if intervention, by any definition, involves the use of force onto another state, the focus must be on the degree to which foreign policy makes use of international law to establish a legal basis for humanitarian intervention to regulate its behaviour. Such a focus draws attention to the role of international law in shaping humanitarian intervention as a legitimate exception to the principle of non-intervention within foreign policy. Especially since humanitarian intervention is dependent upon legal, as well as political concerns that inevitably influence policy outcomes, at this thesis contends.⁶⁷⁴

Subsequently, while states may agree upon which international principles to use in decision-making, the application is always open to interpretation, because effectiveness rests upon interpretation. Therefore, while the content of the rules of international law is the same, the underlying difference is whether the rule meets the criteria of effective

⁶⁷⁴ This dependent characteristic was clarified in chapter one.

legality in the relevant jurisdiction and how that criterion is interpreted. The legitimacy or legality of an action may enter into the decision process of states, but states pursue actions that are determined by their *interpretation* of a rule of international law. Thus, the underlying problem remains, which is not whether a rule of international law is binding but rather how states translate into practice a rule of international law that reasonably claims application of the same question so that the rule arguably functions within the international system.

This reinforces the main claim of this thesis. That the interpretation of international law and its conceptualisation at the domestic level, through a state's domestic legal framework, is crucial to understanding how state and international law interact simultaneously in foreign policy to effect humanitarian concerns.

Thus far this study has identified two dependent characteristics that states may utilize to legally construct international law within foreign policy as it relates to whether or not to use force. First, chapter one argued that based upon Christian Tomuschat's assertions that international law has "no source of democratic legitimacy on its own, its democratic [autonomous] credentials rest on the democratic processes within a state and that states utilize this dependency to construct international law within foreign policy."⁶⁷⁵ This corresponds to this section's assertion that humanitarian intervention is dependent upon not

⁶⁷⁵ Tomuschat 1999:25.

only the moral and political duties of states to intervene but also a legal duty within the jurisdiction of the state to use force or to not intervene when human rights are at issue.

At the core of humanitarian intervention is the question of how to reconcile in the most productive way the degree to which force is used internationally to constrain illegitimate force domestically. This belief was codified in the Charter of the United Nations, Article 2(4).⁶⁷⁶ Two World Wars and the atrocities associated therein forever altered strategic assumptions between states. During the Cold War ideological objectives assumed a duty to intervene in the domestic affairs of states.⁶⁷⁷

Yet, the 1990s witnessed a decade of humanitarian intervention, a decade which began with the expectation of ending massive human rights abuses. These hopes vanished after failures in Somalia and Rwanda (amongst others), but the international community's responsibility to protect and assist people reflects the evolving concepts of use of force and sovereign non-intervention.⁶⁷⁸

To date, however international consensus on appropriate international action does not yet exist nor has international law established an effective mechanism which has the capacity to direct this process. As this author argues though, by interpreting international legal principles through the domestic legal framework, a state theoretically provides an

⁶⁷⁶ Evans 2006.

⁶⁷⁷ McGinnis and Williams 1989:1101-1124.

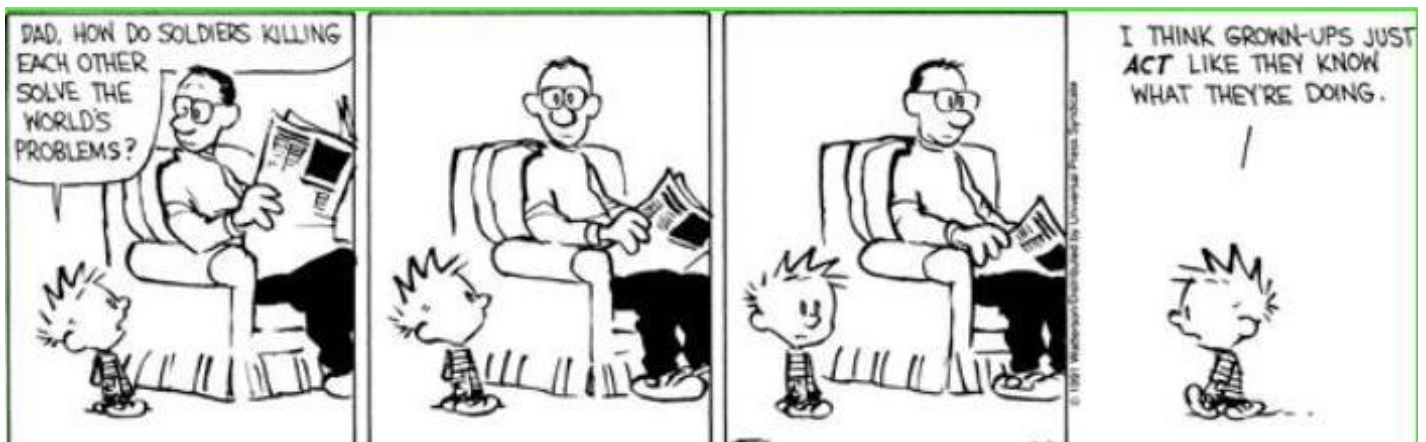
⁶⁷⁸ The Danish Report 1999; ICISS Report 2001.

enforcement mechanism. As a result, and taken together, the legal and theoretical framework of international legal study and foreign policy as set out in sections one and two, constitutes the pursuit of legality within humanitarian intervention decisions.

In situating the historical background and debates concerning humanitarian intervention to the legal and theoretical framework, this section segues to Section Four, the empirical portion of the thesis - the case studies of humanitarian intervention.

***Section Four:
Testing the Theory: the Empirical
Chapters***

The United States and France in Africa



IV. Testing the Theory: the Empirical Chapters

Section Four is the empirical portion of the thesis. It includes the case studies of humanitarian intervention in four regional conflicts in sub-Saharan Africa. In applying neoclassical realism, the chapters that follow illustrate how the United States and France responded to each humanitarian crisis as they each constructed the case to intervene or not to intervene. In this section it becomes evident that a state's legal framework will enhance the state's strategic use of legal reasoning and legal argument to focus on the legitimacy of the international principles at issue, which ultimately affects the course of action a state may be willing to take in humanitarian intervention decisions.

As set out previously, humanitarian intervention is used as a case study because it captures the tension in domestic foreign policy decisions between levels of intervention such as whether to use force, or whether or not to intervene concerning the protection of human rights. These levels of intervention are particularly important when differences in domestic law and international law come into conflict with the implementation of humanitarian objectives.

The four regional conflicts examined have different historical backgrounds and occurred at different times in the larger geopolitical context (1989 vs. 2002). Each conflict however relates directly to legal-political challenges involved in the formation of foreign policy with state legal strategies and international law. These legal-political challenges

still have a wider relevance for humanitarian concerns today. Each conflict answers the question of how states arrive at different interpretations of the same principle of international law to regulate its behaviour within a third state or issue area. Thus, leading to a clearer understanding of how the strategic use of interpretation and legal reasoning reflects the different legal and political traditions of the two countries under study, France and the United States, even when each state faces the same systemic pressures. This legal behaviour will show where humanitarian intervention, as a legitimate practice, and its interests interact with a state's domestic law in the formation of foreign policy that lead states to intervene, or as in the cases of Liberia and initially Rwanda, to not intervene. This will account for the effectiveness of international law within the decision-making process. In that it identifies how a state theoretically provides an enforcement mechanism for international authority at the state level through its unit-level/intervening variables (legal institutions).

Section Four is structured as follows: initially a brief outline on Post-Cold War Developments in sub-Saharan Africa is provided. Chapter Eight then analyses United States foreign policy decisions concerning the Liberian civil war (1989) and Chapter Nine analyses Operation Restore (1992, Somalia). Following this chapter, Chapters Ten and Eleven analyse the foreign policy decisions of France in Opération Turquoise (1994, Rwanda) and the ongoing conflict in Côte d'Ivoire (2002,current), in this order. By way of introduction each chapter provides a brief

overview of the history of each conflict and the stance of the United States and France toward the countries under study in Africa.

To determine the effectiveness of international law within the domestic legal framework, three causal factors are proposed as affecting the influence of the principles of international law on the policy process of each conflict. They are: 1) the decision-makers' arguments for foreign policy reasoning; 2) the domestic legal framework, which includes legal tradition and sources of law; and 3) the actions of the United Nations. Aside from helping to answer the research questions; the causal factors will also help to determine how systemic pressures create an agenda of reference for decision-makers to affect legality and how this is interpreted to explain foreign policy, as explained by the basic architecture of neoclassical realism.

In addition, because states often react differently to similar systemic pressures and decision-makers responses may be less motivated by systemic-level factors than domestic ones; several separate possible rationales for decisions to use force or to not intervene, specific to each conflict, are examined.

Post Cold-War Developments in Sub-Saharan Africa

Despite international developments in human rights during the 1970s and 1980's, it was not until after the end of the Cold War that there was any effective pressure put upon Africa to establish any commitment to

human rights or for that matter any form of domestic accountability.⁶⁷⁹

The reasoning behind this was because as long as Africa was placed between the United States and Soviet Union, policies of containment were adopted to limit Soviet expansion.⁶⁸⁰

The security vacuum following the end of the Cold War in Africa was subsequently filled with internal conflicts which included not only massive human rights abuses against civilians but also the genocide of nearly one-half million people in a matter of months in Rwanda. One of the problems faced by African states, and compounded by the security vacuum, was a lack of leadership and thus a lack of authority. Such was the case in Liberia and Somalia and followed soon thereafter by Rwanda.

One characteristic of these failing states was the greater their relationship with global economic markets, the more the rulers of the failing African states appeared to be predisposed to becoming warlords. As a result there were often several actors within each African state competing for the same right to claim domestic authority and ultimately exacerbating internal conflict.⁶⁸¹ Since the 1990s Africa's internal conflicts have caused more deaths than anywhere else in the world. As

⁶⁷⁹ As the conflicts under discussion in this study illustrate, international developments concerning human rights were either not upheld or proved to be ineffective. This includes: the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, United Nations Security Council Resolution 181 (arms embargo to South Africa) and, the 1981 African Charter of Human and People's Rights 1981 (amongst others).

⁶⁸⁰ Christopher Clapham *Africa and the International System* Cambridge University Press 1998; Yezid Sayigh *Third World Beyond the Cold War* Oxford University Press 2000.

⁶⁸¹ Huband 2001; Sayigh 2000; Brad Roberts (edited) *U.S. Foreign Policy After The Cold War* MIT Press 1992:3-9, 143-156.

well as causing extensive disruption to Africa's fragile political and economic systems, destroying most of its infrastructure. This included health and education, and also damaging the environment which in turn has contributed to further conflict.⁶⁸² To date, insecurity continues to affect the African continent as a whole.⁶⁸³

International security also changed significantly with the end of the Cold War.⁶⁸⁴ This altered perceptions of security toward Africa. First, the end of the Cold War reduced geo-strategic interest in Africa. Africa was therefore perceived to be only of marginal importance regarding global security issues.⁶⁸⁵ These security perceptions changed following the failure of the peacekeeping operations in Somalia and the genocide in Rwanda. Thereafter issues associated with failed states and internal conflicts appeared not only on France's and the United States' political agendas but the world as a whole as well.⁶⁸⁶

As a consequence humanitarian intervention in Africa would prove to be controversial, both when intervention happened and when it failed to happen.⁶⁸⁷ In the case of Liberia's collapse into anarchy and massacres

⁶⁸² Ibid.; see also: Gareth Evans 'Cooperative Security and Intra-State Conflict (Fall 1994) 96 *Foreign Policy* 3-10; Samantha Power 'Bystanders to Genocide: Why the United States Let the Rwandan Tragedy Happen' (September 2001) 288 *The Atlantic Monthly*.

⁶⁸³ Ellis 2001:57-68; Gershoni 1997:55-75; Thom 2000:2-11; Power 2001; Evans 1994:3-10; CRS Report RL30449, *Debt and Developing in Poor Countries: Rethinking Policy Responses* 2003:online; Africa Watch [online]; the Report of the UN Secretary-General on the United Nations Mission in Côte d'Ivoire, 3 August 2003 [online].

⁶⁸⁴ Ignatieff 2003; Coleman 2007; Dunn and Shaw 2001.

⁶⁸⁵ Rothchild 1997:120-145; Dr. Roland Marchal, 2010, 2013.

⁶⁸⁶ Ibid.

⁶⁸⁷ Ibid., Roberts (1992) deals specifically with democracy and human rights issues in Africa.

the United States hesitantly failed to intervene, despite its long standing relationship with Liberia.⁶⁸⁸ In Operation Restore Hope, United Nations forces had to be rescued by United States military forces and then both withdrew and left Somalia in chaos. Moreover, although it is argued that the failure to intervene in Rwanda is one of the greatest scandals of the twentieth century, controversy surrounded France's involvement in Rwanda regarding Opération Turquoise.⁶⁸⁹ Meanwhile France's "presence and use of force in the Côte d'Ivoire conflict involuntarily, but in effect, separated the state in two."⁶⁹⁰

With this in mind, the following chapters will focus on how the United States and France responded to each humanitarian challenge through the legal-political decision-making process and the degree to which foreign policy makes use of both state and international law concerning humanitarian intervention.

⁶⁸⁸ Harbeson & Rothchild 2000; Schraeder 1994; Clapham 1998; Whitaker 1978.

⁶⁸⁹ "France in Africa: Mitterrand's muddle", *The Economist*, London: Feb 27, 1993, Vol. 326, Iss.7800, pg. 42 (author: anonymous). "In June 1994, the French government declared that it would set up a 'safe zone' in the southwest of the country and set out the objectives of Opération Turquoise, which has been considered controversial."

⁶⁹⁰ France's response force *Licorne* was sent in to protect the population and prevent another humanitarian crisis (*Jeune Afrique L'Intelligent*, n° 2322 du 10 au 16 juillet 2005); 'France in Africa:Mitterrand's muddle' 1993.

The United States: Liberia & Somalia

The United States' presence in Africa only became significant after World War I and African independence. During the Cold War, United States foreign policy toward Africa had little to do with Africa.⁶⁹¹ It was instead rationalized by the need to protect western interests and limit Soviet expansion.⁶⁹²

In December 1992 President Bush (H.W.) sent military forces to Somalia to provide for the delivery of food and emergency supplies.⁶⁹³ The operation had the full support of the United Nations to “use all necessary means to establish a secure environment for humanitarian relief in Somalia.”⁶⁹⁴ In direct contrast to the use of force for humanitarian objectives in Somalia is the lesser known Liberian conflict. In December 1989, a small band of rebels began a civil war that claimed the lives of nearly ten percent of the population and all but destroyed Liberia's economic infrastructure. Diplomatic efforts were held in an effort to find a resolution, but a military intervention was ruled out.⁶⁹⁵

Somalia illustrates a multilateral intervention led by the United States for the purpose of the protection of human rights, one which permitted the use of military force for that protection. Liberia on the other hand is clearly a case of non-intervention but one that should have necessitated

⁶⁹¹ Clapham 1998; Clarke and Herbs 1996.

⁶⁹² Chester 1974.

⁶⁹³ Kansteiner 2009:106. (as set-out in the Introduction Kansteiner was the Director of African Affairs for the State Department in 1989; he was appointed the Director of African Affairs for the National Security Council in 1992 and 2001-2003 he was the Assistant Secretary of State for African Affairs.

⁶⁹⁴ Ibid.

⁶⁹⁵ Kansteiner 2009:105-116; US Security Issues in Africa 1992.

the same type of human rights protection. Their case studies illustrate the rationales that brought about such different foreign policy outcomes

8. Liberia

United States Relations with Liberia

The United States has had a long-standing relationship with Liberia which included direct political and economic involvement dating back to the nineteenth century when the American Colonization Society, a private, philanthropic organization, assisted freed American slaves in settling on the African coast.⁶⁹⁶ Liberian state structure and society reflected a blend of indigenous and *Americo-Liberian* cultural and political influences, which included adopting the United States Constitution as a model and the dollar as their currency until the mid-1980s.⁶⁹⁷

In the early years of independence a United States military presence was established in Liberia to discourage French and British colonial intentions, as well as U.S. interest in Robertsfield Airport.⁶⁹⁸ In 1926 Firestone Tire and Rubber established operations in Liberia further increasing United States-Liberian ties and became the principal private-

⁶⁹⁶ Harbeson and Rothchild 2000; Schraeder 1994. Recent activities include a 2007 Memorandum of Understanding (MOU) between the State of Maryland and Liberia signed in Annapolis, Maryland. The MOU is “to further enhance cultural and historic understanding and cooperation, and to promote international trade between the USA and Liberia”. Available from: *The Analyst* 28 August 2007 [online].

⁶⁹⁷ Ibid.

⁶⁹⁸ In 1942, Liberia signed a Defense Pact with the United States which included strategic road building and other construction related to US military interests to check the expansion of communism. Robertsfield Airport was originally built by the U.S. government as an Air Force base as part of these activities (Report of the Foreign Relations of the United States 1955-57 Volume XVIII, Africa, US Government, Washington DC 1989).

sector employer. Several defence cooperation pacts were signed in the 1940s and the United States Peace Corps was present in Liberia from 1962 to 1990. The United States was Liberia's leading pre-civil war trading partner and a major aid donor until the Liberian civil war began in 1989.⁶⁹⁹

When the civil war began, the United States choose not to intervene. Instead U.S. citizens were evacuated from Liberia and talks to establish a peacekeeping force were not favoured in Washington.⁷⁰⁰ While the United States supported the Economic Community of West African States (ECOWAS)⁷⁰¹ both financially and diplomatically, early negotiations that sought to involve the United Nations were unsuccessful and Liberia was not placed on the United Nations' agenda until nearly three years later.⁷⁰²

Background to the Liberian Conflict (1989-1997)

On 24 December 1989 the National Patriotic Front of Liberia (NPFL) led by Charles Taylor crossed into Liberia from Côte d'Ivoire to remove Samuel Doe as the dictatorial Liberian President. President Doe tried to contain the threat of the NPFL with the Armed Forces of Liberia (AFL) but Taylor defeated Doe's forces. By July 1990 all civil authority within

⁶⁹⁹ Harbeson and Rothchild 2000.

⁷⁰⁰ Communication from the President of the United States, 'Concerning Armed Forces Sent to Monrovia, Liberia', House Document 101-224, August 6, 1990.

⁷⁰¹ The African Union was the first regional (multinational) organisation to incorporate into its Charter the collective right to intervene in conflicts to protect civilians in humanitarian emergencies (David Wippman 'Enforcing the Peace: ECOWAS and the Liberian Civil War' in *Enforcing Restraint: Collective Intervention in Internal Conflicts* Council on Foreign Relations 1993).

⁷⁰² Kansteiner 2009; Gershoni 1997.

Liberia had broken down.⁷⁰³ In August 1990, members of the Economic Community of West African States Monitoring Group (ECOMOG) attempted to impose a cease-fire through military intervention.⁷⁰⁴ The ECOMOG intervention was undertaken after the United Nations and the United States declined to intervene in the civil war. In September 1990 President Doe was captured, tortured and killed.⁷⁰⁵

The conflict that ensued escalated into a seven-year civil war despite the signing of multiple peace agreements, the presence of United Nations observers⁷⁰⁶ and the deployment of a regional intervention force dispatched by the Economic Community of West African States (ECOWAS).⁷⁰⁷ A peace process, initiated in mid-1996, resulted in the July 1997 election of Charles Taylor as president of Liberia.⁷⁰⁸

The Humanitarian Situation of the Liberian Conflict

The civil war shocked much of the world by the extent of its bloodshed and human tragedy largely due to Taylor's systematic abuse of human rights. According to the United Nations Development Programme (UNDP) and the United States Agency for International Development (USAID) it is estimated that the conflict caused between 150,000 and

⁷⁰³ Taylor was former minister and friend of President Samuel Doe (Ellis 2001:57-68. Wippman 1993:157-203).

⁷⁰⁴ Ibid.

⁷⁰⁵ Ibid.

⁷⁰⁶ Following a cease fire agreement ("Cotonou Accord") the UN Security Council established the United Nations Observer Mission in Liberia (UNOMIL) to oversee the five-member transitional council created by the Cotonou Accord (*UN peacekeeping, 50 years, 1948-1998* (1998) United Nations Department. of Public Information p:33).

⁷⁰⁷ Ellis 2001:57-68; Gershoni (1997:55-75) discusses the ineffectiveness of the international community and why the United States should have intervened in Liberia.

⁷⁰⁸ Ellis 2001. Nancee Oku Bright 'Liberia: America's Step Child, A Documentary' (2002) www.pbs.org/wgbh/globalconnections/liberia accessed 15 March 2012

200,000 deaths and displaced much of the population.⁷⁰⁹ It also caused considerable reduction to rural food production and cut off international trade, causing hunger and widespread malnutrition.⁷¹⁰ In April 1998, international donors agreed to resume aid to Liberia. In September of the same year, Liberia received foreign assistance from the International Monetary Fund (IMF). In March 1999, UNDP provided Liberia with 3.4 million dollars for housing construction and a credit programme for small business owners.⁷¹¹ A second civil war broke out in Liberia in April 1999 which lasted until 2003.⁷¹²

United States Policy toward the Liberian Conflict

As Liberia's civil war escalated many Liberians hoping for intervention from the United States were surprised when the United States did not intervene. Instead United States citizens were evacuated from Liberia. Hopes for a United States peacekeeping force were thwarted. Former Assistant Secretary of State for Africa, Herman Cohen, wrote that the various agencies within the State Department and other African agency specialists supported a United States intervention in Liberia to protect United States facilities and pursue resolution of the conflict.⁷¹³ This was in addition to the evacuation of United States citizens from Liberia. For

⁷⁰⁹ UNDP in Liberia [online].

⁷¹⁰ CRS Report RL30449, September 2003:online. Concerning security issues which affected Liberia during the conflict, and current security issues, see the Security Council's *Monthly Forecast* [online].

⁷¹¹ Cook (2003) CRS Report for Congress, Liberia: 1989-1997 Civil War, Post-War Developments, and U.S. Relations, Updated December 31, 2003. The Report covers Liberia's first civil conflict (1989-1997) and the history of U.S.-Liberian relations.

⁷¹² Gershoni 1997:55-75.

⁷¹³ Herman J. Cohen *Intervening in Africa: Superpower Peacemaking in a Troubled Continent* Palgrave Macmillan 2000 (Cohen served as Assistant Secretary of State for Africa between 1989 and 1993).

the policymakers responsible for Africa, Liberia was a concern not only for obvious humanitarian reasons but also because it “threatened to destabilize an entire region given that the civil war in Liberia would most likely spill over into the neighbouring countries.”⁷¹⁴ However, according to Cohen, higher-level decision-makers did not share these objectives and saw little need for a United States role in Liberia.⁷¹⁵ Kevin George reiterated Cohen’s sentiment when speaking before the United States Senate.

“Unfortunately, the [first] Bush administration did not place Liberia high on its list of foreign affairs priorities. President Bush did not ever publicly speak about the conflict in Liberia. Former Secretary of State James Baker III never publicly spoke about the conflict in Liberia. This lack of high-level concern for Liberia among the top leadership of the U.S. Government was perceived by Liberians as abandonment and may have fostered a continuation of the conflict.”⁷¹⁶

Senator Nancy Kassebaum raised the Liberia issue with Bush’s administration officials in the mid-1990s but her concern received very little Congressional support from either political party.⁷¹⁷ Administrative policymakers were, however, considering the Liberian situation from a number of different perspectives particularly as Roberts Field airport possessed a facility for storing military supplies as well as Liberia’s proximity to Angola.⁷¹⁸ Another issue was Libya’s role in supporting

⁷¹⁴ CRS Report, Liberia: 1989-1997(2003); Cohen 2000.

⁷¹⁵ Cohen 2008; Oku Bright 2012.

⁷¹⁶ Statement of Kevin George, President, Friends of Liberia. Hearing before the Subcommittee on African Affairs of the Committee on Foreign Relations, United States Senate, Washington, D.C., 1993:54.

⁷¹⁷ Statement of Senator Nancy Kassebaum to the Subcommittee on African Affairs. Hearing before the Subcommittee on African Affairs of the Committee on Foreign Relations, United States Senate, 1993:1-2.

⁷¹⁸ Cohen 2008; Oku Bright 2012.

Charles Taylor. Because of this support the isolation of Libya was a priority for some of the higher level decision-makers.⁷¹⁹

The principle input for the Liberian decision-making process came from the State Department and the Defense Department via the Central Intelligence Agency (CIA). This low level of input stemmed from the decline of an official United States presence in Liberia and as a result some policymakers viewed Liberia as peripheral to United States interests.⁷²⁰ The State Department called for numerous interagency meetings, including a number of Deputy Committee meetings, most of which took place via secure television, in part due to the 1992 Government cables leaked to the NPFL who then released the cables to the press.⁷²¹

From the early stages of the conflict the Defense Department made it clear that it was not interested in spending resources in an area not considered strategically important and the National Security Council agreed.⁷²² The State Department also found it difficult to put forth a case for military intervention because “all sides in the Liberian conflict were committing atrocities.”⁷²³ In addition, a BBC documentary entitled

⁷¹⁹ Ibid.

⁷²⁰ Kansteiner 2009; Cohen 2008; Oku Bright 2002.

⁷²¹ In November 1992, a series of U.S. cables were leaked to the National Patriotic Front of Liberia (NPFL) who then released the cables to the press. The cables provided insights into the United States’ attitude toward ECOMOG. Thereafter ECOMOG commanders were reluctant to inform the United States about their strategies and internal operations. Six months after the leaked cables United States officials were still making little effort to deal with the consequences (Statement of Janet Fleischman of Africa Watch to the Subcommittee on African Affairs, June 9, 1993:35).

⁷²² Kansteiner 2009; Cohen 2008; Oku Bright 2002.

⁷²³ Kansteiner 2009:108-110.

“wigs vs. skirts”, viewed by numerous policymakers, “vividly depicting the role of African *juju* (magic)” significantly influenced the decision-making process.⁷²⁴

As a consequence Liberia was no longer favoured with particular attention or engagement and a basic position of non-interference in Liberian internal affairs became an appropriate guiding principle for United States’ foreign policy.⁷²⁵ According to Cohen however, others believed that the historically close relationship between the United States and Liberia obligated the United States to take some responsibility toward Liberia’s humanitarian needs and human rights abuses. This included the developmental needs necessary for promoting a democratic system of government.⁷²⁶

As the conflict continued, United States involvement in Liberia centred on policy that ensured the delivery of emergency humanitarian assistance, provided technical and logistical support to the ECOWAS Monitoring Group (ECOMOG) and supporting ECOWAS and United Nations mediation efforts but not of military assistance.⁷²⁷ This position was reaffirmed by Assistant Secretary for African Affairs George Moose, in a 1993 statement before the Subcommittee on African Affairs. It was the only hearing held on Liberia:

⁷²⁴ Kansteiner 2009:108-110; Cohen 2008.

⁷²⁵ Cohen 2008; see also Wippman 1993; Harbeson 2000; Huband 2001; Cook 2003.

⁷²⁶ Cohen 2008; see also Wippman 1993.

⁷²⁷ From 1989 to 1997 the United States provided no military assistance to Liberia (USAID publication *Overseas Loans and Grants, Obligations and Loan Authorizations July 1, 1945- September 30, 2001* [online]); also Cook 2003.

We have strongly encouraged and supported that [ECOWAS] effort and will continue to do so. At the same time, I would simply add that we continue to urge support for ECOMOG. We believe that in due course ... the Yamoussoukro Accords will be implemented fairly and objectively and that no party need be unduly concerned about the manner in which that accord is implemented. ... [O]ur concern for the Liberian people and our desire for peace is unconstrained by strategic necessities ... ultimately it will be the people of Liberia themselves who must resolve to make the most of their opportunity and chart the future of this nation. That remains the essence of our policy.⁷²⁸

Later Senator Kassebaum argued in 1993 that the Clinton White House should reverse the policy of non-intervention and adopt her view that the response of the United States to Liberia had to be stronger.⁷²⁹ This position was further supported by Janet Fleischman of African Watch, who reported in a 1993 statement that the United States was aware of the increasing human rights problems associated with the ECOMOG intervention, yet United States foreign policy still revolved around full support for ECOMOG.⁷³⁰

There is an obvious discrepancy between what American officials say in private, as evidenced by the leaked cables and other statements intended to be off-the-record, such as former Assistant Secretary of State Herman Cohen's statements questioning ECOMOG's neutrality which aired on the BBC in November 1992. It is critical for the administration to make clear its concern about human rights violations by both ECOMOG and the forces with which it is allied, and condition its aid on respect for human rights.⁷³¹

The United States response to the Liberian conflict was repeatedly criticized as inadequate. It was further suggested that it would have been

⁷²⁸ Statement of George Moose, Assistant Secretary for African Affairs, Department of State, June 9, 1993:4-10.

⁷²⁹ Kassebaum 1993.

⁷³⁰ Fleischman 1993:29-31,57.

⁷³¹ Ibid.

appropriate for the United States to have sent in troops at various stages of the conflict to help restore order and protect civilians given the special relationship between Liberia and the United States.⁷³² Much of the critique centred on Haiti as an example of a successful humanitarian intervention in comparison to the non-intervention stance taken by the United States and the international community regarding Liberia.⁷³³

Another aspect of United States policy during the Liberian conflict was its support for the United Nations Observer Mission in Liberia (1993-1997).⁷³⁴ UNOMIL was charged with monitoring compliance with cease-fire agreements and a ban on arms shipments to Liberia, the disarmament and demobilization of combatants, election observations and assisting in the coordination of humanitarian aid.⁷³⁵ However, the United Nations' role in Liberia also deserves analysis in relation to the United States response.⁷³⁶

Although the United Nations contributed significantly to the emergency relief and humanitarian aid to Liberia, it did not address the crisis in political terms until November 1992. It was nearly three years after the

⁷³² Ibid; Report of the UN Secretary-General on the Question of Liberia (UN Doc. S/25402 of 12 March 1993); 1993 U.S. Policies toward Africa: Liberia, Togo, and Zaire.

⁷³³ Gershoni 1997; Oku Bright 2002.

⁷³⁴ Report of the UN Secretary-General on the Question of Liberia (UN Doc. S/25402 of 12 March 1993) ¶ 40; Clement E. Adibe 'The Liberian conflict and the ECOWAS-UN partnership (1997) 18(3) *Third World Quarterly* 471: 482; David J. Francis *Dangers of co-deployment: UN co-operative peacekeeping in Africa* Ashgate Publishing, Ltd. 2005:128.

⁷³⁵ Ibid.

⁷³⁶ In addition, aside from the BBC documentary, there were few media reports except for the occasional article appearing in the *New York Times* or *Washington Post* concerning human rights violations (Kenneth Noble (June 16, 1990) *The New York Times* [US Library of Congress Archives, Washington, DC]).

crisis began when the UN imposed an arms embargo.⁷³⁷ The United Nations Secretary General dispatched a special representative to investigate the situation. The report, released in March 1993 makes no reference to human rights. Human rights language is notably absent from the Secretary General's report, "thus missing yet another occasion to raise the issue of human rights protections into the peace negotiations. The report suggested that there might be a role for U.N. observers to monitor a new cease-fire agreement, but foresaw no human rights monitoring component to their mandate."⁷³⁸

Causal Factors Affecting International Law on the Policy Process

The Decision-makers' Arguments for Foreign Policy Rationale: Despite the close relationship between the United States and Liberia, the United States took a basic position of non-interference in spite of concerns of human rights abuses. This was because the State Department had a difficult case to make for military involvement given that all sides in the Liberian conflict were committing atrocities.⁷³⁹ More specifically foreign policy set out that the United States was 'unconstrained by strategic necessities in Liberia and no party need be unduly concerned about the manner in which that [peace] accord is implemented'.⁷⁴⁰ As the conflict continued involvement in Liberia centred on foreign policy

⁷³⁷ Report of the UN Secretary-General on the Question of Liberia 1993 ¶ 40.

⁷³⁸ U.S. Policies toward Africa: Liberia, Togo, and Zaire 1993:35; Human Rights Watch, Human Rights Watch World Report 1994 - Liberia, 1 January 1994; and 1993 Report of the UN Secretary-General on the Question of Liberia.

⁷³⁹ Moose 1993: 4-10.

⁷⁴⁰ Ibid.

that ensured emergency assistance and one that supported mediation efforts alongside ECOWAS and United Nations.

The Domestic Legal Framework: Both the constitutional and legal framework on human rights existed but was nullified given the lack of concern from top government officials in both Administrations. The issues would have been reviewed by the Office of the Legal Adviser.⁷⁴¹ This lack of concern was further exacerbated by the United Nations' failure to incorporate human rights language into its reports, a factor which influenced how the legal language of foreign policy was constructed.

Actions of the United Nations: The United Nations did not address the Liberian conflict in political terms until November 1992. More importantly, human rights language is notably absent from the United Nations Report released in mid-March 1993. Consequently, the United Nations Secretary General failed to raise the issues of human rights protections into the peace negotiations.⁷⁴²

Legal Analysis of the Causal Factors

In analysing the four causal factors that influenced the policy process concerning the role of international law, the research finds that

⁷⁴¹ The 1945 United Nations Participation Act requires that the president receive congressional approval before committing armed forces to special agreements with the United Nations (Avalon Project http://avalon.law.yale.edu/20th_century/decad_031.asp).

⁷⁴² Human Rights Watch, Human Rights Watch World Report 1994 - Liberia, 1 January 1994, <http://www.unhcr.org/refworld/docid/467fca7914.html> [accessed 12 August 2012].

international law did aid in regulating foreign policy regarding Liberia, but did so in an indirect manner. This finding is consistent in that the use of force and protection from the violations of human rights were not legally interpreted as a threat to international peace and security within the United State's domestic legal framework. In other words, while making its case for non-intervention the United States recognised the legal nature of the underlying principles at issue but it basically interpreted international law in a way that matched its own legal and political interests at the time.⁷⁴³ This included United Nations' interests. Issues neither the United States nor United Nations were prepared to identify – severe human rights atrocities.⁷⁴⁴ This is evidenced by the application of the sovereign non-intervention principle, instead of the principle of human rights, which meant non-involvement in the Liberian humanitarian crisis.⁷⁴⁵

As illustrated both the constitutional and legal framework on human rights and use of force existed but were nullified. Through legislative procedure, Senator Kassebaum clearly established human rights abuse violations attributable to the state of Liberia against its citizens as set out in Restatement (Third) § 702 where 'consistent patterns of gross violations of internationally-recognised human rights' were visible.⁷⁴⁶

⁷⁴³ Thesis:203-4; 206.

⁷⁴⁴ Thesis:227-228.

⁷⁴⁵ Ibid.

⁷⁴⁶ Thesis:222-223. Restatement of the Law, Third, Foreign Relations Law of the United States (1987) consists of international law as it applies to the United States and domestic law that has substantial impact on the foreign relations of the United States. For the most part, the domestic component of the law restated is federal law derived from the Constitution, acts of Congress and judicial decisions.

Therefore not only are rules of international law recognised in the Constitution but also in the tort law of the United States, for the reason that human rights are considered part of the law of the United States.⁷⁴⁷

Based upon this legal status, the relationship between domestic law and international law and the status of the international legal rules within the United States' domestic jurisdiction should have been clearly visible. Consequently the interpretation of human rights abuses would have portrayed humanitarian intervention as both a state concern and an instrument of foreign policy. The foreign policy articulated however compromised Liberia's human rights issues due to the failure to incorporate the facts of the conflict with human rights language in the foreign policy decisions.⁷⁴⁸ The policy decisions would have also included information gathered from the United Nations Reports.

As stated above, although the international rule of human rights may have been positioned within the domestic legal framework, its representation relevant to the Liberian humanitarian situation was not interpreted to protect fundamental human rights in its foreign policy decisions. This is peculiar since both international and domestic law advance the protection of human rights, as well as the regulation of the use of force for that protection. These principles are clearly set out

⁷⁴⁷ The Supremacy Clause allows the "automatic incorporation of ratified treaties and puts them in the position to be applied by national courts. Though the constitutional provision of the United States refers to treaties only, the clause has been interpreted as inclusive of customary law". Henkin 1996:238. See also, *Filartiga v. Pena Irala* (630 F 2nd 876 2nd Cir 1980).

⁷⁴⁸ Thesis;180; 222-223.

within written text that provides a succinct, albeit basic, definition of human rights and establishes its status, as outlined in chapter seven.

One explanation for this rationale may be that there were no formal legal guidelines for humanitarian intervention decisions in place at the time. The absence of a reasonably consistent set of legal guidelines would have contributed to the controversy and repeated criticisms of inadequacy amongst government officials who defended a decision to use military intervention. The lack of guidelines can be legally defended and attributed to the fact that the application of international law by the state depends upon a decision by the domestic legal system.⁷⁴⁹ This would have included any limits that legislature may have imposed or on which the US courts had ruled. In this regard, there were insufficient sources of law at the domestic level to rule upon or otherwise provide reasoning and as a consequence the state's legal structure was unable to recognise humanitarian concerns in the formulation of its foreign policy.

The scope of legal protection afforded by the United States is defined by precedent. In the Liberia matter there was no case law to justify intervention for humanitarian reasons. Unlike the precedent established in *Filartiga v. Pena Irala* (630 F 2nd 876 2nd Cir. 1980)⁷⁵⁰ regarding the status of human rights relative to sources of law and specifications for the domestic court to assert jurisdiction, the policy articulated concerning

⁷⁴⁹ Donnelly 1999; Jouannet 2009; Armstrong and Farrell 2012.

⁷⁵⁰ *Filartiga* established that it was not necessary for the United States to ratify a specific human rights treaty for domestic courts to assert their jurisdiction to handle a torts case for torture and homicide committed in Paraguay, by a Paraguayan national against another Paraguayan.

Liberia was unable, or even unwilling, to interpret human rights language because the United States (and the United Nations) attempted to detach itself from the substantial injuries incurred during the Liberian conflict.⁷⁵¹

It can be reasoned therefore that the conceptual structure for humanitarian intervention at the US's domestic level was unfamiliar and interpretation made it appropriate to apply the sovereign non-intervention principle to its foreign policy decision. It also suggests that the status of international legal rules within the United States domestic jurisdiction and political justification require a framework with clear and consistent guidelines. In this case, there was an obvious necessity to provide internal guidance to government officials, as well as non-governmental, to explain intervention decisions taken or not taken as opposed to restrictive legal language. Language that was further restricted by conflicting international legislation (the 1993 UN Report), which upheld the misconduct of the Liberian state while setting aside human rights protection for Liberian citizens. In this instance, there was a need to integrate the principle of human rights together with the humanitarian situation to allow for essential legal change within the existing legal frameworks of both the United States and United Nations. Arguably, this would have then allowed for outcomes that were presumably acceptable to all participants.

⁷⁵¹ Theses:221-222.

Through the above analysis it can be determined that norm restriction is evident as attention to human rights was considered a separate part of the process in establishing foreign policy (at both domestic and international levels).⁷⁵² This underscores how we understand the importance of the application of sources of law and legal reasoning regarding the course of action to be taken in conflict situations, as set out in chapter one. In positioning non-intervention between the principles of human rights and sovereignty, the US identified both its legal scope and its limitations. Inasmuch as the legal authority of a state carries with it the authority to impose limitations, including those based upon the principles of human rights. The assumption of responsibility afforded international rules is dependent on domestic law for implementation and as such is legally and politically constructed within foreign policy. As this thesis argues, this will provide international rules political authority at the state level. In the case of Liberia, the international rules dependency upon US domestic law effectively restricted international law's political authority.

As outlined in the introduction to this section, additional possible rationales, specific to each conflict are considered. These rationales will further identify how sources of law and the strategic use of interpretation and legal reasoning recognise a rule of international law within the state's legal structure for policy purposes.

In the case of Liberia, one additional possible rationale for non-intervention can be further explained based upon the causal factors.

⁷⁵² Thesis:223-224.

The United States was unable to authorize viable policy action because the United Nations avoided language relating to human rights nor did the United Nations condemn the actions undertaken during the Liberian conflict.

Another possible explanation for the United States' non-intervention behaviour could be that it was difficult to interpret the principles of humanitarian intervention. This is based on several reasons: one, the United Nations' notable absence of human rights language in its report, as well as its failure to raise the issue of human rights protections in the peace negotiations;⁷⁵³ and two, the United States domestic decision-making process considered the legal issue of human rights a separate part of the policy process.⁷⁵⁴ These two reasons had the effect of nearly isolating human rights from the entirety of the conflict itself and weakening the influence of structural (systemic) factors that account for the effectiveness of international legal principles in shaping the structure of authority and legitimacy within the domestic decision-making process.

This absence of language makes clear how crucial the facts presented for evaluation in the decision-making process function. The interpretation of the information provided illustrates how a state will interact with principles of international law to construct effective foreign policy concerning humanitarian issues. In this case, interpretation was based on facts that were not provided. This afforded justification for the decision not to use military force in connection with human rights issues. This not only weakened the human rights concerns and strengthened the

⁷⁵³ Thesis 223-224.

⁷⁵⁴ Thesis 215-216.

sovereign non-intervention principle, but the United States, as well as the United Nations, were then not obligated to any issues of liability or legal responsibility on behalf of the Liberian citizens; which would have required appropriation of money by the US Congress and use of military personnel.

As a matter of law interpretation of the rules of humanitarian intervention in the formulation of foreign policy as legitimate is of importance. The application and enforcement of which affect not only the international community but the state that is in conflict as well. Discerning which rule to apply will depend on the factual circumstances of the humanitarian situation, violations of human rights should have established intent as the key for military intervention in Liberia. While there were no specific requirements shaping United States foreign policy at the time, the relationship between its domestic law and international law concerning the legal status on human rights existed at both levels of law. Clearly legal status was fully in force at the time of the Liberian non-intervention decision.

Furthermore, as this case reflects, the effectiveness of the international rule alone may not be enough because even if international rules succeed in entering into a state's legal system they are still subject to possible restrictions imposed by the state. This was clearly evident since issues of the human rights atrocities in Liberia were almost entirely isolated from the decision-making process. This does however reinforce the fact that

state interest is a strong element of humanitarian support when it concerns violations of human rights.

In concluding this chapter, it is necessary to take into account that the relationship between domestic law and international law has two aspects. The first is the underlying limitation of sovereign rights and the second is the status of international legal norms within a state's domestic jurisdiction. As discussed in chapter seven, another explanation for non-intervention surrounds the debate on humanitarian intervention. Whether violations of human rights should be interpreted as a threat to international peace and security or whether use of force is a satisfactory alternative in accordance with Article 2.7 of the Charter, which prohibits intervention in situations 'essentially within the domestic jurisdiction of any state'.⁷⁵⁵

Historically it has been assumed that the end of the Cold War would allow a more unified and active Security Council to fulfil its primary responsibility for the maintenance of international peace and security.⁷⁵⁶ Yet, based upon the circumstances witnessed in Liberia it is evident that this period saw a blurring of the circumstances and the manner in which the Security Council could exercise responsibility, in particular its relative definition of a threat to international peace and security. This was rather odd. While a great deal of international law is based upon

⁷⁵⁵ Evans 2006:9.

⁷⁵⁶ Ignatieff 2003; Coleman 2007; Baehr & Castermans-Holleman 2004; Abbott 2005; Rothchild 1997.

pre-existing state practice, the community of states has the legal capacity and authority to formulate legal principles through multilateral consultation, even in the absence of pre-existing state or international practice.

In the case of Liberia, violations of human rights were not viewed as a threat to international peace and security and therefore were not seen as warranting military intervention. The arguments presented by the United States may have advocated support for humanitarian aid, supporting ECOWAS and the United Nations' mediation efforts to prevent human rights violations, but the United States did not link military intervention to human rights in the course of its policy process. This was advocated clearly in its foreign policy decisions.

While ECOWAS's use of military force in Liberia is outside the scope of this thesis, it does draw attention to the fact that the African community was able to interpret facts in support of force as necessitated by the mitigating circumstances, - the conflict and the non-intervention of the international community. As indicated above, the United States justified its decision of non-intervention based upon issues that both the United States and the United Nations were not prepared to address, the issue of human rights. It could have been argued that an intervention for humanitarian reasons would be consistent with the purposes of the United Nations, namely the protection of fundamental human rights; an argument that was put forth in later United States policy decisions in Operation Provide Comfort and Operation Restore Hope.

Humanitarian Intervention as a Legal Instrument of Foreign Policy

Although the humanitarian aspect of the human rights abuses in Liberia and the crisis it presented created an agenda of reference for decision-makers, as suggested by neoclassical realism, the recognition of humanitarian intervention as a legitimate practice and therefore its legal status failed to interact with the decision-making process. In essence the international principle of human rights may have been positioned within the United States' domestic legal framework, but its representation was not interpreted to protect fundamental human rights in its decisions concerning Liberia. As noted previously it is evident that the domestic policy process considered the human rights issues as separate from the decision-making process, essentially bifurcating human rights from the conflict itself.

Perhaps more significantly while supporting non-intervention, the United States did not move forward with an interpretation of the human rights principle as its traditional manner would suggest (distinctly different from the international level). The interpretation of the abuse of human rights, a fundamental Constitutional principle, was not represented as a threat to international peace and security. Consequently, the regulation of humanitarian intervention as a domestic concern and thus an instrument of foreign policy, in this instance, had implications in its application, because it reduced the pressure to militarily participate.

Finally, evidence would suggest that both international law and state law on the issues of humanitarian intervention in Liberia could be interpreted as insufficient to protect core human rights values. While arguably the principle of non-intervention is an outcome of the basic principle of sovereignty, it is debatable whether the application of non-intervention was based upon this reasoning. Instead it became obvious that the laws on human rights and sovereignty could not take place simultaneously concerning outside intervention by either the United States or the United Nations (i.e., the international community). In this case, when assessing the interpretation of human rights to the legal framework in the formulation of non-intervention, it would be necessary to also consider the state and international legal dimensions of unenforceability or deliberate non-enforcement.

9. Somalia: Operation Restore Hope (1992-1993)

United States Relations with Somalia

United States interests in Somalia began during the Second World War.⁷⁵⁷ These interests included a naval facility for the United States at the port of Berbera as well as military and electronic facilities elsewhere. During the Cold War Somalia held geopolitical importance due to its proximity to the Middle East and strategic location next to the Red Sea and Persian Gulf.⁷⁵⁸ From 1978 until 1989, the United States was an important ally to Somalia and provided a large amount of economic and military assistance. The United States Embassy in Mogadishu also became one of the largest US diplomatic missions in Africa.⁷⁵⁹

Even after war broke out in May 1988, the United States continued to provide military assistance and to defend Somalia against a non-supportive Congress that was increasingly critical of the Somalia government's human rights record and its conduct of the conflict.⁷⁶⁰ Between 1989 and 1990, however, the Bush administration began to disengage from Somalia and institute change in its policies. This was a

⁷⁵⁷ Edward W. Chester *Clash of Titans: Africa and U.S. foreign policy* Orbis Books 1974; Ioan M. Lewis *Modern History of Somalia: Nation and State in the Horn of Africa* Longman Publishers 2002; and Lewis *Understanding Somalia and Somaliland: Culture, History and Society* Hurst Publishers, Ltd. 2008; Nina J. Fitzgerald *Somalia: Issues, History and Bibliography* Nova Biomedical 2002.

⁷⁵⁸ In the early 1960s the United States supported Emperor Haile Selassie with military assistance; whereas the Soviet Union supported President Siad Bare's regime, who took power in 1969 (Ibid.) Also Kansteiner 2009:105-116; US Security Issues in Africa, Hearing before the Subcommittee on African Affairs of the Committee on Foreign Relations, US Senate, 1992 Library of Congress.

⁷⁵⁹ Kansteiner 2009; Fitzgerald 2002.

⁷⁶⁰ 1995 Executive Summary entitled: *Somalia: Humanitarian Success and Political/Military Failure* (Major L. M. Martin, United States Marine Corps); Kansteiner 2009:112-116; "Somali Requests \$1.6 Billion in American Arms as Aid", July 18, 1983 International Defense Intelligence Report.

direct result of pressures from Congress who demanded disengagement on human rights grounds,⁷⁶¹ as well as the realization that Somalia's government was disintegrating and that Cold War rivalries had ended.⁷⁶²

Background to the Somalia Conflict (1991- ongoing)

The Somali Civil War began in 1991 and has caused destabilisation and instability throughout the country.⁷⁶³ Somalia has been without an effective central government since 1991 when factions overthrew President Siad Barre.⁷⁶⁴ The collapse of Somali lies in the breakdown of its traditional society and Somalia's role as a Cold War proxy of both the United States and the Soviet Union. At the time, Siad Barre's clan benefited the most from the large influx of foreign aid, initially from the Soviet Union until 1977 and thereafter from the United States.⁷⁶⁵

The conflict began after Siad Barre precipitated a war against Ethiopia in 1977, causing instability and an increase in Siad Barre's repressive behaviour. To maintain power he began a policy of systematic kidnapping and murder against rival clan leaders that increased in intensity over time. Finally, in 1990 during anti-government riots, Siad Barre's bodyguards killed sixty-five civilians and seriously injured over three hundred. Losing legitimacy, Siad Barre was forced to flee the country in January 1991. The collapse of Somalia's central government

⁷⁶¹ Martin 1995.

⁷⁶² Kansteiner 2009.

⁷⁶³ Thomas J. Callahan 'Some Observations on Somalia's Past and Future' (March 1994) *CSIS Africa Notes*, No. 158; Chester 1974; Lewis 2008; Fitzgerald 2002.

⁷⁶⁴ Ibid.

⁷⁶⁵ 1983 International Defense Intelligence Report: footnote 55.

created a void that was rapidly filled by rival political faction leaders turned warlords and thereafter Somalia fell into a state of political and economic chaos.⁷⁶⁶

In addition to the conflict, a drought-caused famine was causing starvation and death to thousands in Somalia and refugees were becoming a problem in neighbouring Kenya and Ethiopia.⁷⁶⁷ Although numerous humanitarian relief organizations were in Somalia, there was little progress in stopping the devastation. Faced with humanitarian disaster and exacerbated by a complete breakdown in Somalia's civil order, the United Nations created the United Nations Operation in Somalia I (UNOSOM I) in April 1992.⁷⁶⁸ However, due to the local warlords and their rivalries failure to compromise with each other, UNOSOM I could not be fulfilled - the main challenge to the flow of relief supplies continued to be the rivalry between feuding warlords.⁷⁶⁹

In response to the worsening famine, Operation Provide Relief was initiated in August 1992, but problems associated with distribution continued to hinder the relief effort.⁷⁷⁰ In December 1992, a coalition led by the United States and termed Operation Restore Hope, approved

⁷⁶⁶ Clapman 1998; Thom 2000; Lewis 2002, 2008; Fitzgerald 2002.

⁷⁶⁷ Crisis and Chaos in Somalia: Hearing before the Subcommittee on African Affairs of the Committee on Foreign Relations, United States Senate, Washington DC, September 16, 1992; United Nations *The United Nations and Somalia, 1992-1996* United Nations, Department of Public Information 1996.

⁷⁶⁸ UNISOM I was the first part of a United Nations effort to provide humanitarian relief in Somalia, as well as monitor the first ceasefire of the conflict in the early 1990s (United Nations Operations in Somalia <http://www.un.org/Depts/DPKO/Missions/unosomi.htm>).

⁷⁶⁹ Ibid.

⁷⁷⁰ Crisis and Chaos in Somalia 1992; *The United Nations and Somalia* 1996.

by the Security Council, was deployed to Somalia to protect relief workers with a mandate to protect humanitarian operations and create a secure environment for eventual political reconciliation and the authority to use all necessary means to ensure that relief supplies reached those who needed them.⁷⁷¹ The United States withdrew in late 1993 after the military operation left eighteen United States troops dead. UNOSOM II, the second United Nations mission, withdrew in March 1995.⁷⁷²

The Humanitarian Situation of the Somalia Conflict

Human rights conditions in Somalia were, and continue to be, a problem due to the unstable political situation in the country.⁷⁷³ Since 1991, widespread violence, poverty, persistent droughts and floods have generated a complex humanitarian emergency in Somalia. Statistics from the United Nations indicate that the first year of the conflict saw a massive loss of life due to famine and civil war.⁷⁷⁴ The Human Rights Status Report concurred with the U.N. report and included that the rape of women between 1991 and 1994 “was widespread and has been used as a tool to punish and intimidate ethnic factions.”⁷⁷⁵ United Nations and

⁷⁷¹ United Nations Security Council Resolution 794 (1992) ¶ 3; Martin 1995.

⁷⁷² Martin 1995; Lewis, 2002

⁷⁷³ 1993 Amnesty International Report: Somalia: A Human Rights Disaster [online].

⁷⁷⁴ 1996 Human Rights: Somalia, United Nations Report, and *The United Nations and Somalia, 1992-1996* (1996).

⁷⁷⁵ The Human Rights Status Report [online]; The Human Rights Crisis in Somalia, The Human Rights Crisis in Somalia, Georgette Gagnon, Director of the Africa Division of Human Rights Watch, before the United Nations Security Council, March 31, 2008 hrw.org/news/2008 accessed 31 March 2015; International Committee of the Red Cross (ICRC) Annual Report 2009 [online]. Of note, it was not until 2001 that rape was ruled a war crime. It is now also recognised as an element of the crime of genocide when committed with the intent to destroy a targeted group; rape remains widespread in conflict zones (Ibid). This problem links directly to the thesis’ position concerning issues which have a wider relevance for humanitarian concerns today (Thesis:1,25). See for instance: Baker who writes on “the intimate nature of sexual assaults” (Aryn

humanitarian agencies efforts to deliver food and aid were constantly met with armed opposition and the hijacking of relief supplies. Operating conditions continue to challenge aid workers, as many are often victims of killings, roadside bombs, abductions and harassment.⁷⁷⁶

United States Policy toward the Somalia Conflict

The Bush administration's position throughout much of 1991 and early 1992 was that the crisis was an internal Somali problem; that it did not represent a threat to regional or international stability.⁷⁷⁷ However officials at the State Department's Africa Bureau, including Assistant Secretary of State for African Affairs Herman Cohen, as well as Andrew Natsios, the Assistant Director of USAID, and James Kunder, Bureau for Food and Humanitarian Assistance,⁷⁷⁸ were concerned about the Somalia tragedy and pressed for a more active United States response.

In January 1992, Natsios began holding regular press conferences to highlight the ongoing humanitarian catastrophe.⁷⁷⁹ In June 1992, the United States Ambassador to Kenya, Smith Hempstone Jr., travelled to

Baker 'War and Rape' (2016) *Time* April 36-41. Nussbaum who writes on female mutilation and objectification (Martha C. Nussbaum 'Capabilities and Human Rights' (1997) 66 *Fordham Law Review* 273) and Andrea Dworkin 'Rape is not just another word for suffering' (2000) *Times Higher Education* www.timeshighereducation.com.

⁷⁷⁶ USAID: Somalia – Complex Emergency, May 14, 2010, Situation Report #5, Fiscal Year (FY) 2010.

⁷⁷⁷ Official statement on Somalia, *U.S. Department of State Dispatch* June 29, 1992.

⁷⁷⁸ Cohen 2000; Statement of James Kunder, Director, Office of Foreign Relations, Hearing before the Subcommittee on Africa Affairs, House of Representatives Committee on Foreign Affairs, Washington, DC, February 17, 1993 [US Library of Congress Archives]; Hirsch, John L. and Robert B. Oakley *Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping* United States Institute of Peace 1995.

⁷⁷⁹ "Natsios claimed Somalia was the worst humanitarian crisis in the world, that mass starvation and violence against civilians had been going on since the fall of 1991" (Hirsch and Oakley 1995:43).

the Somali-Kenyan border. He reported his trip in a cable to Capitol Hill entitled “*A Day in Hell*,” and outlined the humanitarian suffering.⁷⁸⁰ Walter Kansteiner, Director for African Affairs at the National Security Council, forwarded Hempstone’s cable onto Bush. Within a few days, Bush returned the cable to Kansteiner with a number of questions and comments written in the margins.⁷⁸¹

In early summer 1992, Somalia was also becoming a regular feature on the evening news, a fact not lost on a White House engaged in a political campaign that did not have foreign policy as a major component.⁷⁸² According to Walter Kansteiner, “political pressure began to resonate at the White House and in late July, Bush encouraged staff to examine additional diplomatic efforts to enhance the United Nations efforts in Somalia.”⁷⁸³ There is evidence to suggest that Bush’s policy shift on Somalia came in response to both the increasing pressure to do something in Somalia and also in response to the political backlash on Bosnia.⁷⁸⁴

The few NGOs working in Somalia issued reports in autumn 1991 citing the catastrophic conditions.⁷⁸⁵ On 23 January 1992 the Security Council

⁷⁸⁰ Lofland 2006; Don Oberdorfer ‘U.S. Took Slow Approach to Somali Crisis’ *The Washington Post* August 24, 1992:A13.

⁷⁸¹ President Bush reportedly wrote in the margins “this is a terribly moving situation. Let’s do everything we can to help” (Oberdorfer 1992:A13).

⁷⁸² Jane Perlez Deaths in Somalia Outpace Delivery of Food’ *New York Times*, July 19, 1992:A1.

⁷⁸³ Kansteiner 2009 (as footnoted on page 214, Kansteiner was the Director of African Affairs for the State Department in 1989, etc.).

⁷⁸⁴ U.S. Department of State Dispatch Supplement (September 1992:14); *U.S. News and World Report*, 1992:26–30.

⁷⁸⁵ Gagnon 2008 [online]; International Committee of the Red Cross (ICRC) Annual Report 2009 [online].

voted unanimously to increase humanitarian aid to Somalia (Resolution 733) and called for an embargo on weapons and military equipment sent to Somalia.⁷⁸⁶ On 24 April 1992 the United Nations increased aid (Resolution 751)⁷⁸⁷ and authorized the deployment of fifty United Nations observers to monitor food distribution (UNOSOM I), which collapsed from infighting and an inability to provide safety for relief operations.⁷⁸⁸

By the end of July, Boutros-Ghali outlined his concerns in his report to the Security Council. Boutros-Ghali also openly complained about the West being more interested in Bosnia than the humanitarian catastrophe in Somalia and accused ‘Western leadership of being racist.’⁷⁸⁹ A few days after Boutros-Ghali’s public accusation the United Nations approved an emergency airlift and the deployment of five hundred peacekeepers (Resolution 767).⁷⁹⁰

Senators Kassebaum and Simon travelled to Somalia in July 1992. Both held hearings on the human rights tragedy in Somalia offering evidence that chronic insecurity remained and that “the conflict and the scarcity of food fed on each other in a vicious spiral.”⁷⁹¹ The first hearing was held on 16 September 1992 just after Bush agreed to supplement United

⁷⁸⁶ UN Report: Items Relating to the Situation in Somalia, Resolution 733 (1992) [https://undocs.org/S/RES/733\(1992\)](https://undocs.org/S/RES/733(1992)).

⁷⁸⁷ UN Report: Items Relating to the Situation in Somalia, Resolution 751 (1992) [https://undocs.org/S/RES/751\(1992\)](https://undocs.org/S/RES/751(1992)).

⁷⁸⁸ Callahan 1994:2; see also *The United Nations and Somalia, 1992-1996*.

⁷⁸⁹ Lofland 2002:56.

⁷⁹⁰ 1992 Congressional Hearing on US Security Issues in Africa; and *The United Nations and Somalia, 1992-1996* (1996:93-96); 1992 U.N. Security Council Resolution 767, S/RES/767.

⁷⁹¹ Hirsch and Oakley 1995.

States support for the United Nations Operation in Somalia (UNOSOM I).⁷⁹² A major point of contention for opponents to UNOSOM, led by John Bolton, Assistant Secretary of State for International Organizations,

[W]]as the fear that deployment of armed forces would be a precedent-setting action by the Security Council and might lead to greater United States military involvement when United Nations forces got into trouble.⁷⁹³

Further evidence was provided however as to how efforts to deliver food were met with armed opposition and the hijacking of relief supplies.⁷⁹⁴

Despite Bolton's protests, on 15 August 1992 a security force was formed to protect United Nations humanitarian operations in Somalia, Operation Provide Relief.⁷⁹⁵ The issue remained under intense debate among the State Department and the NSC staff.⁷⁹⁶ Prior to the December 1992 intervention the Joint Chiefs of Staff, including General Colin Powell,⁷⁹⁷ "argued during interagency meetings that humanitarian emergencies, by their nature, were political events in which one side or another would 'balk' at international assistance."⁷⁹⁸ Opposing calls for US humanitarian military interventions in Somalia (as well as Liberia and Bosnia). It was argued that the conflict was not relevant to United

⁷⁹² United Nations Security Council Resolutions 733 and 746 led to the creation of UNOSOMI (footnotes 781, 782).

⁷⁹³ *Africa: Changing Realities and US Response*: Hearing before the Subcommittee on African Affairs, March 19, 1992.

⁷⁹⁴ Dymally 1992 opening statement before the Africa Subcommittee of the House Foreign Affairs Committee (Library of Congress Archives).

⁷⁹⁵ "President Bush had increased United States commitment of aid and assistance to Somalia through the United Nations during the previous month" (Ibid); Lofland 2006:57.

⁷⁹⁶ *Africa: Changing Realities and US Response* (1992); Lofland 2006:58; Clark 1993.

⁷⁹⁷ Chairman of the Joint Chiefs of Staff 1989-1993 (<http://www.jcs.mil/About/The-Joint-Staff/Chairman/General-Colin-Luther-Powell/>).

⁷⁹⁸ Senior Bush Administration officials and outside experts understood that Somalia was a collapsed state and that any lasting food relief and stabilization required answers to political issues (Clark 1993:109-123); Kansteiner 2009.

States vital interests; it was simply a humanitarian tragedy.⁷⁹⁹ There was also consensus among senior officials that the crisis in Somalia was, at the core, a political issue that could not be readily resolved with the use of military forces.⁸⁰⁰

A second hearing followed on October 1992 wherein evidence stated that “the security situation had deteriorated and starvation and malnutrition are widespread.”⁸⁰¹ The hearing further discussed the role of the United Nations and the United States commitment to Somalia.⁸⁰² A Report followed in November 1992 outlining the “total collapse of a country with mass starvation and utter lawlessness. ... The Somalia people need food and medicine urgently ... but essential to their survival now is *hope*.”⁸⁰³

Operation Restore Hope (1992-1993)

By December Bush had wide congressional support on the conflict.⁸⁰⁴ “Senate majority leader George Mitchell stated that there was no need to reconvene Congress under the terms of the War Powers Act⁸⁰⁵ because

⁷⁹⁹ In its opposition, the Joint Chiefs argued that the nature of the conflict in Somalia was fuelled by tribal hostilities and the country was heavily armed, making force protection virtually impossible. *Crisis and Chaos in Somalia*: Hearing before the Subcommittee on African Affairs (September 16, 1992); Clark 1993:113; Kansteiner 2009.

⁸⁰⁰ Ibid.

⁸⁰¹ *UN Peacekeeping in Africa: The Western Sahara and Somalia*. Hearing before the Subcommittee on African Affairs, October 1992:6-7, 17.

⁸⁰² Ibid.

⁸⁰³ Report to the Committee on Foreign Relations, United States Senate, Senator Paul Simon and Senator Howard Metzenbaum, November 1992 (*Hope* is italicised in the Report).

⁸⁰⁴ On 4 December 1992 President Bush met with a number of congressional leaders to brief them on the troop deployment (*Resolution Authorizing the Use of United States Armed Forces in Somalia*, May 11, 1993:3).

⁸⁰⁵ The War Powers Act is a legally binding joint resolution concerning the war powers of Congress and the President which was resolved by the Senate and the House of

the mission in Somalia was aimed at feeding the starving rather than putting down a revolt or dislodging a government.”⁸⁰⁶

As the humanitarian situation worsened in Somalia a United States led coalition - Operation Restore Hope - approved by the Security Council, was deployed to Somalia to protect relief workers on 4 December 1992.⁸⁰⁷ Its mandate was to protect humanitarian operations and create a secure environment for eventual political reconciliation until a more permanent United Nations peacekeeping force could take on the responsibilities.⁸⁰⁸

Operation Restore Hope also had the authority to ‘use all necessary means’ to ensure that relief supplies reached those who needed them.⁸⁰⁹ Significantly, Resolution 794 referenced Chapter 7 of the United Nations Charter, concerning peace enforcement.⁸¹⁰ This was the first time in which the United Nations had sanctioned or actively participated in the armed intervention of a sovereign state without invitation. On 10 December 1992 Bush reported, consistent with the War Powers Resolution, that United States armed forces had entered Somalia on 8 December 1992 in response to a humanitarian crisis and a United

Representatives in Congress assembled. The joint resolution is cited as the “War Powers Resolution” Public Law 93-148, 93rd Congress, H.J. Res. 542, dated November 7, 1973, p:1, further cited in 50 United States Code 1541-1548.

⁸⁰⁶ Ibid., Kansteiner; US Senate Report November 1992; Martin 1995.

⁸⁰⁷ Ibid 794 at ¶3 [online].

⁸⁰⁸ Ibid.; see also Lofland 2002; Kenneth Allard (Colonel) *USA, Lessons Learned Somalia: A First Look (Final Draft)*, Institute for National Strategy Studies (Library of Congress Archives) 1995:7.

⁸⁰⁹ Ibid 794 at ¶3. Operation Restore Hope also met the requirements set out in the Weinberger-Powell doctrine on intervention, which was designed to achieve limited, specific objectives with the support of overwhelming force if needed. Martin 1995.

⁸¹⁰ U.N. Security Council Resolution 794; Lofland 2002; Martin 1995.

Nations Security Council Resolution determining that the situation constituted a threat to international peace.⁸¹¹

During the course of Operation Restore Hope additional hearings and reports commenced to discuss the foreign policy decisions in Somalia as well as the authorization and legality of US military forces.⁸¹² With respect to United States domestic law on the legality necessary for military participation evidence was put forth that under Section 6 of the United Nations Participation Act, “the President is authorized to negotiate and implement proposed policy to support United Nations peace operations, when considered vital to protect national security interests.”⁸¹³

[T]he President therefore has a wide range of discretion in interpreting and applying the Charter, like other laws. Congress has parallel legislative powers in relation to the Charter ... especially in areas that involve the use of force.⁸¹⁴

In accord with authorization of United States action in Somalia, the House passed Joint Resolution 45 authorizing the President to use United States armed forces in implementation of “United Nations Security Council Resolution 794 of 3 December 1992 and Resolution 814 of 25

⁸¹¹ Bush had included as authority applicable treaties and laws and views expressed in House Congressional Resolution 370 and Senate Congressional Resolution 132 (on the urgent need for action in Somalia)’ and the Horn of Africa Recovery and Food Security Act, Public Law: 102-274; however none of these resolutions explicitly authorized U.S. military action’ (Catalogue of 105th and 106th Congressional Bills, Library of Congress). See also Ken Menkhaus and Louis Ortomayer Key Decisions in the Somalia Intervention *Pew Case Studies in International Affairs* 1995:5; Maryann K. Cusimano Operation Restore Hope: The Bush Administration’s Decision to Intervene in Somalia *Pew Case Studies in International Affairs* 1995:11.

⁸¹² The Situation In Somalia (1992).

⁸¹³ Statement of Conrad K. Harper, Esquire, Legal Advisor, US, Department of State: United Nations Peacekeeping: the Effectiveness of the Legal Framework: Hearing before the Legislation and National Security Subcommittee of Government Operations, House of Representatives Committee on Foreign Affairs 1994:34-37.

⁸¹⁴ Ibid:94-95.

March 1993 to constitute the specific statutory authorization under Section 5(b) of the War Powers Resolution.”⁸¹⁵

On the subject of the humanitarian operation in Somalia, Harry L. Johnston stated: “[I] plan to begin a systematic inquiry into the idea of humanitarian intervention as an element of post-cold war United States policy.”⁸¹⁶ He further stated that “the implication of the Somalia operation is that we have advanced our thinking on the concept of humanitarian intervention. Operation Restore Hope ... has provided valuable insights into factors that should guide policymakers in those rare instances when military intervention to save lives should be considered.”⁸¹⁷

The United States withdrew its mission in late 1993 after the military operation left eighteen United States Rangers dead.⁸¹⁸ On 7 October 1993, amid rapidly deteriorating public and congressional support for the mission, Clinton announced his intent to end US involvement in Somalia by 31 March 1994. Clinton enacted PDD25, a presidential directive which placed strict conditions on United States support for UN

⁸¹⁵ Resolution Authorizing the Use of United States Armed Forces in Somalia (May 11, 1993) Menkhaus and Ortomayer 1995; Cusimano 1995.

⁸¹⁶ Johnston chaired the Hearing for the House of Representatives on Foreign Affairs Committee, Subcommittee on Africa. Recent Developments in Somalia (February 17, 1993:7).

⁸¹⁷ Kunder 1993:7-10.

⁸¹⁸ Statement of Donald M. Payne, Recent Developments in Somalia: Hearing before the Subcommittee on Africa Affairs (17 February 1993:11-12). See also, U.S. Policy in Somalia, Hearing of the Senate Foreign Relations Committee, Washington DC July 29, 1993; U.N. Peacekeeping In Somalia, Hearing of the Senate Foreign Relations Committee, October 20, 1993; and the *United Nations* 1996:93-96.

peacekeeping.⁸¹⁹ This decision was supported by the Defense Appropriations Act for FY1995 which prohibited the use of funds for the continuous presence of US forces in Somalia, except for the protection of US personnel after September 30, 1994.⁸²⁰ The remaining Marines, who had remained to protect United States diplomats, were withdrawn 15 September 1994.⁸²¹ UNOSOM II, the second United Nations mission, withdrew in March 1995.⁸²²

Causal Factors Affecting International Law on the Policy Process

The Decision-makers' Arguments for Foreign Policy Rationale: Despite the Bush administration's early position that the crisis in Somali was an internal problem that did not represent a threat to regional or international stability, officials within the State Department; and other United States agencies, pressed for a response to the humanitarian suffering.⁸²³ Notwithstanding opposition to secure military forces, a case for military involvement was heightened following reports concerning the deterioration of security, which was emphasized alongside the tragedy of the human rights situation and widespread starvation.⁸²⁴

The Domestic Legal Framework: Both the constitutional and legal framework on human rights and use of force were present. The Constitution requires specific congressional authorization for the

⁸¹⁹ Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda 1999, Part III, Chapter 7 [online].

⁸²⁰ Statement on Signing the Department of Defense Appropriations Act (assigned Public Law No. 103–335) 1994 <https://www.congress.gov/public-laws/103rd-congress>.

⁸²¹ Allard 1995; Menkhaus and Ortomayer 1995; Cusimano 1995.

⁸²² Ibid.

⁸²³ Thesis:241-244.

⁸²⁴ Thesis:245-247.

deployment of US forces to potential combat abroad under the War Powers Act.⁸²⁵ As is discussed below, the use of human rights language was specifically applied to legitimately justify use of force within the context of foreign policy for the protection of basic human rights.

Actions of the United Nations: Reports citing the catastrophic conditions were first issued in 1991.⁸²⁶ Further efforts were made by United Nations Secretary-General Boutros-Ghali without garnering much attention. Following this Boutros-Ghali accused the West of “racism”,⁸²⁷ which brought about a United Nations emergency airlift and the deployment of five hundred peacekeepers.⁸²⁸ Various Resolutions were initiated on the grounds of humanitarian concerns.

Legal Analysis of the Causal Factors

In analysing the causal factors that influenced the policy process concerning the role of international law on the situation in Somalia, the research finds that international law’s effectiveness was determined by its interaction with the United State’s domestic legal framework. The question as to whether, in the case of a civil conflict, international law could or would authorise use of force for humanitarian concerns can only be decided by the state concerned and issues that support or negate that decision. In this case the interpretation of humanitarian concerns was given statutory and constitutional authority at the state level so to permit

⁸²⁵ Thesis:245.

⁸²⁶ Thesis:240.

⁸²⁷ Lofland 2002:56.

⁸²⁸ Thesis:243.

the use of military force for humanitarian protection at the international level.

In positioning human rights and use of force, the US identified both its legal scope and its limitations in establishing humanitarian concerns into its foreign policy. The limitations were highlighted by the Joint Chiefs of Staff and other government officials who initially argued against intervention they saw as inappropriate and outside the effectiveness of United States domestic law.⁸²⁹ Legal scope is witnessed by the constitutional positioning of the applicable principles of international law pursuant to the United Nations Participation Act as well as the War Powers Resolution.⁸³⁰ This gave President Bush both statutory and constitutional authority to enable the United States to participate in and support United Nations peace operations, under Section 6 of the United Nations Participation Act.⁸³¹

The application of both statute and constitutional provisions was relevant given the language that governed high-level concern and input from upper level government officials in the decision-making process. This level of input was enhanced by the United Nations Secretary-General Boutros-Ghali, who incorporated humanitarian needs and human rights language in his reports,⁸³² a factor which clearly influenced how the language of foreign policy on the conflict was constructed.

⁸²⁹ Thesis:245.

⁸³⁰ Thesis:247-8

⁸³¹ Ibid.

⁸³² Thesis:243, 246.

When read together, the Security Council resolution and applicable U.S. laws provided the legal basis for U.S. military action under international law in its application of use of force because the United States, through the Security Council, interpreted the relationship between violations of human rights within another state and the threat to international peace and security as sufficient grounds for ordering humanitarian intervention. Moreover, the framing of humanitarian intervention in foreign policy in this case was significantly supported by the fact that the United Nations ruled that violations of human rights as well as the violence and instability in Somalia constituted a threat to international peace and security.⁸³³ Thus the violation of human rights, a fundamental U.S. constitutional principle, was recognised as a threat to international peace and security. In this way the United States was able to extract specific constitutional rules to support humanitarian concerns in its decision for use of force (as established in chapter two).

Of significance in the case of Somalia is the fact that the application of the international legal principles was legitimated and presented for authorisation at the state level not by state legal precedent, but by the necessity to first identify the principles represented by the humanitarian situation and then determine how these legal principles could be translated into policy to invoke policy action. This was because at the time there was no existing law or consensus which defined humanitarian intervention and thus there was no obligation at either state or

⁸³³ Thesis:247.

international levels for intervention decisions. While it will always be argued that state interest, coupled with public opinion, plays a role in decisions concerning use of force, or whether or not to intervene, justification for intervention by the United States will require the interaction of and balancing of domestic concerns with international concerns. These concerns create significant practical challenges to interpreting the responsibilities of protecting human rights, even if those rights are interpreted and applied by reference to human rights violence. In this regard it will also be necessary to identify those rights as well as determine what effect the use of force may have on the character of the conflict.

International law, and thus the United Nations, may govern the legal relations between states and actors who comply with the rules of international law, but it does not provide a legal mechanism for determining intervention decisions (see section one and chapter 7). The United States, and the international community as a whole, may have been bound by the existence of certain international legal principles - use of force and human rights – that would not otherwise be legally binding upon them outside of state interest. Clarity for the enforcement of these principles was only found in the domestic legal framework because it was necessary to identify applicable law, and more importantly to allow the United States to determine its own legal obligations.⁸³⁴ As a result, the effect brought about by U.S. legal behaviour was a key factor for

⁸³⁴ Thesis:244-5, 247.

determining its intervention decision(s) in Somalia. As the thesis predicted, in utilizing neoclassical realism state and international law interacted simultaneously by interpreting humanitarian concerns through its domestic legal framework. The U.S. therefore did theoretically provide an enforcement mechanism for international authority at the state level in its use of force decision.

In addition, the decision to intervene in this case promoted the decision-makers' perceptions of security which had the effect of strengthening the influence of humanitarian concerns in the domestic environment and as such become an essential element in establishing foreign policy. This was based on information received at both the international and domestic levels. In Somalia the policy decision was supported by the need to secure peace and security.

Norm expansion is also evident since the principle of human rights, similar to non-intervention, was recognised as having the status of *jus cogens*.⁸³⁵ This status was reflected in *The Humanitarian Situation in Somalia* (Hearing 17/12/92) and in consultations with the United Nations, wherein it was debated whether the question of sovereignty should prevent the International Community from taking a sustained and concerted effort to protect civilians in Somalia. Following this rationale, again recall that the relationship between a state's domestic law and

⁸³⁵ In the *Vienna Convention on the Law of Treaties* 1969, at §53, *jus cogens* is defined as "a peremptory norm of general international law." Human rights is an example of *jus cogens*, as is genocide. See also, Restatement (Third) of the Foreign Relations of the United States § 702 (1987) "A state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide".

international law has two aspects. The first of which is the underlying limitation of sovereign rights. However, if a sovereign state obtains its authority from the rights of its citizens and if it fails to recognise the rights from which its power is obtained the sovereignty, in effect, undermine its own legitimate authority.⁸³⁶

This reiterates whether the use of force during humanitarian action is in fact an act against the sovereign integrity of a state as was discussed in chapter seven. Since intervention in the case of Somalia was not an attack on the state but rather an operation involving a humanitarian situation, the primary factors in the decision to intervene are the main focus of the action; including action within a state which may mitigate the humanitarian situation. Consequently, in this case the decision to use military force in connection with human rights issues, in effect, weakened the sovereign non-intervention principle.

In addition, two further possible rationales based upon the United State's domestic legal sources and reasoning for intervention can be explained when interpreting the causal factors. First, the perception of Somalia exclusively as a humanitarian instead of military concern influenced the attitudes of the executive branch policymakers.⁸³⁷ Second, foreign policy conformation with Security Council resolutions refers to the legal standing at issue at the state level - thus identifying sources and process

⁸³⁶ Thesis, Chapter 7(a) Key Reoccurring Legal Debates on Humanitarian Intervention.

⁸³⁷ Thesis: 242-3, 245.

of the strategic use of interpretation and legal reasoning for policy purposes.⁸³⁸

Perceptions of Somalia as a humanitarian instead of military concern influenced the attitudes of the executive branch policymakers

In the policy disputes within the executive branch agencies, claims based upon the relevant international rules of human rights raised the burden of justification necessary to overcome the objections of military involvement. The framing of Somalia as a humanitarian instead of military concern influenced the attitudes of the executive branch agencies in their perception of the conflict. This is evidenced by the numerous congressional hearings and language used to describe the ‘catastrophic human rights condition’.⁸³⁹ Congressional hearing language was further strengthened by the United Nations incorporation of humanitarian needs and human rights language. In this instance humanitarianism became a crucial strategic legal instrument of foreign policy. Particularly as no threat to national security existed or was referenced in the foreign policy. As such both principles – use of force and human rights – are legally reasoned and legitimately implemented in policy construction.

Also, the positioning of the facts and the interpretation of those facts had a significant impact on judgments arising from the application of use of force in the decision making process. For example, the nature of the

⁸³⁸ Thesis: 247, 252-3.

⁸³⁹ Thesis:242..

civil war and attacks on civilians impacted the perceptions of the United States and the United Nations (as well as the international community). The perception of the conflict in Somalia was clearly framed by Congress as humanitarian yet the Joint Chiefs of Staff and senior officials regarded Somalia in military terms. This point is significant in that communicating a humanitarian perspective within the Bush administration was problematic for foreign policy decision-making (as well as security) because no threat to national security existed and national interest was rather narrowly defined. Although executive policy-makers found no guidance concerning precedent in case law or legislative history for humanitarian intervention, they interpreted human rights language as an indication of humanitarian liability (legal responsibility) under both domestic and international law.

Therefore rationale for this difference in perception was important when evaluating the risks associated with the conflict in Somalia to the humanitarian consequences. Moreover, the use of human rights language provided substantial leverage in the interpretation of this principle within the constructs of foreign policy relevant to domestic sources of law. It is also apparent that there was a change in perception regarding the United State's intervention and the efforts by Congress to invoke use of force in Somalia from Operation Restore Hope in December 1992 to the US withdrawal in 1993.

Foreign policy conformation with Security Council resolutions refers to the legal standing at issue at the state level – thus identifying sources

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Concerning the actions of the United States, when read together Security Council Resolution 794 provided the legal basis for US military action under international law.⁸⁴⁰ The legal framework for international law within domestic law is one of cooperation and obligation under a treaty; therefore Security Council resolutions provide authority for US action under international law. However, congressional authorization is required under domestic law as governed by the US Constitution, the United Nations Participation Act, as well as by the War Powers Resolution. In this case the application of the use of U.S. forces to a potential combat area was substantiated by Joint Resolution 45 authorizing the President to use United States armed forces in implementation of United Nations Security Council Resolution 794.

The Joint Resolution constituted specific statutory authorization within the meaning of section 5(b) of the War Powers Resolution (S.J. Res 45) as necessitated by existing United States statutory law and the basic principles of policy-making. In this instance, the War Powers Resolution provided a mechanism for legislative consideration underlying such authorizations and afforded legitimacy and strength to the foreign policy. Legislative consideration was further shaped by the executive decision-makers perception and interpretation of the humanitarian situation within the Somalia conflict. Moreover, Section 6 of the United Nations Participation Act authorized the President to negotiate and implement

⁸⁴⁰ Thesis:246-8.

proposed policy to support United Nations peace operations. This provided the process through which Congress sought to implement the war powers balance, based upon its reliance on specific legal statutory authority for domestic enforcement and effective application of the principle on use of force involving human rights.

In establishing the humanitarian catastrophe and human rights abuses as a guideline for use of force in humanitarian intervention, the United Nations ruled that the violations of human rights as well as the violence and instability in Somalia constituted a threat to international peace and security. This is reiterated by the United States in its rationale for the protection of human rights, etc. In the opinion of this author, it should be construed as a redefinition of both domestic jurisdiction and the threat to international peace and security as prescribed under Chapter 7, Article 39 of the United Nations Charter, given the degree of harm and destruction incurred. (This confirms the aim/originality of this research project.)

Unlike Operation Provide Comfort following Desert Storm, which provided humanitarian and security assistance to the Kurds in Northern Iraq,⁸⁴¹ Operation Restore Hope established a unique precedent.⁸⁴² What began as a United Nations humanitarian assistance mission (UNISOM I)

⁸⁴¹ Operation Provide Comfort began with disaster relief and refugee control and evolved into humanitarian and security assistance, bypassing the sovereignty of a nation-state defeated in war, but still a nation-state pursuant to Security Council Resolution 668 (Doc.S/RES/668(1991) [online].

⁸⁴² As a case for precedent, Somalia can be interpreted as evolving *opinio juris* regarding the legality of humanitarian intervention (*the belief that an action was carried out because it was a legal obligation* (emphasis added). As stated above, this distribution of legal power is set forth in the U.S. Constitution.

in December 1992 was unopposed since there was no Somali government to resist entry.⁸⁴³ From a legal point of view, it could be said that Somalia, though retaining legal capacity, had for all practical purposes lost the ability to exercise that legal capacity. A key element in this respect was the fact that there was no governmental body which could have committed Somalia in an effective and legally binding way. In addition, Operation Restore Hope was considered a humanitarian rescue requiring assistance not an intervention. This is documented in the congressional hearing records presented in *United States Policy toward the Somalia Conflict* above.⁸⁴⁴

When considering that the intervention occurred during a transitional period in the international order, new standards for international action might have been established and would have alleviated contemporary arguments surrounding the contradictions between use of force and sovereignty (non-intervention), a contradiction highlighted by the United Nations Charter.⁸⁴⁵ From a legal perspective expanding the scope of international law and therefore its interpretation within the domestic framework would justify legal change. Drawing on this legal change could have provided a clear development toward a changed scope of state sovereignty with respect to the state and human rights abuses. Especially if the principle of human rights is impartially applied (of

⁸⁴³ Thesis:239.

⁸⁴⁴ Thesis:240

⁸⁴⁵ Thesis:71-2.

course a definition for impartiality would have to be applied as well as who would make the decision to define it.

Humanitarian Intervention as a Legal Instrument for Foreign Policy

Humanitarian intervention in Somalia was clearly recognised within the United State's legal structure and can therefore be interpreted as an instrument of foreign policy. Legal analysis of the issues surrounding humanitarian intervention appeared to be refined in the Somalia policy decisions. As determined by policy-makers, the 'idea of humanitarian intervention as an element of post-cold war United States policy' ... 'provided valuable insights into factors that should guide policymakers'.⁸⁴⁶ Consequently, presentation of the relevant facts and the necessity of interpretation of the humanitarian situation allowed 'norms to be adapted to unforeseen situations.'⁸⁴⁷

In the case of Somalia there was a need to interpret international legal rules within an existing domestic legal framework to construct foreign policy to effect humanitarian concerns. This interpretative process operated between humanitarian concerns and foreign policy in order to necessitate military action. However, it is questionable whether Somalia establishes the norm of humanitarian intervention as a part of the U.S. domestic legal framework. Somalia may have established precedent at the international level, in that the humanitarian circumstances concerning human rights abuse was recognised and positioned within the U.S.

⁸⁴⁶ Kunder 1993:7-10

⁸⁴⁷ Thesis:31.

domestic legal framework, which therefore interacted with the decision-making process. However, in Somalia, the policy disputes within the executive branch agencies, its claims based upon the relevant international rules, raised the burden of justification necessary to overcome the objections of military involvement. In addition, the decision was further justified in that Operation Restore Hope was considered a humanitarian rescue requiring assistance, not an intervention.

While it may be a given that international law contributes to the obligation of the stability of the international order, but as this thesis puts forth, the interpretation of the legality of humanitarian crises at the state level will depend upon the interpretation of the circumstances at issue in any given case. In early 1992, no clear precedent had been established for post-Cold War humanitarian interventions. Furthermore, and as a general rule, only a few members of the United States executive branch agencies, as well as the United Nations, had much interest in or understanding of the events surrounding civil conflict in Africa (or any other international civil conflicts at the time). As a result, humanitarian crises lacked a legal organizational framework and mechanism for legitimate implementation outside the Security Council (the ongoing legality-legitimacy debate discussed in chapter eight outlines this problem).

As expressed above, expanding the scope of international law and therefore its interpretation within the domestic framework would justify

legal change and could have provided a clear development toward a changed scope of state sovereignty with respect to the state and human rights abuses. Although it would still be necessary to question whether the use of military force is justified in the case of humanitarian crises, recognising the potential for a humanitarian catastrophe will no doubt aid in establishing its application. Of course a problem which instantly arises would be framing its accountability aspects, particularly if no threat to national security is established.

Summary

Although Liberia and Somalia were very different interventions, it is appropriate that they are considered together as they had significant impact on the status of humanitarian intervention and its function within the United States. Liberia revived the controversy concerning the legitimacy of humanitarian intervention in the domestic affairs of a sovereign state.⁸⁴⁸ As discussed in Section Three, the right to intervention or *le droit d'ingerence* was frequently challenged as violating the principle of non-interference in a state's domestic affairs,⁸⁴⁹ but following the end of the Cold War the international community began to assist and protect people at risk within their own state. Somalia represented the first time human rights violations were interpreted as a

⁸⁴⁸ The Liberian conflict also brought into focus the role of regional organizations in the maintenance of peace and security (Thesis:216).

⁸⁴⁹ Article 2.7 of the UN Charter (Evans 2006).

threat to international peace and security and a Chapter 7 intervention was authorized for explicitly humanitarian purposes.⁸⁵⁰

As with any legal framework, domestic or international, and as a matter of law, politics are relevant to perceptions surrounding security and how it shapes a state's foreign policy (as emphasised in chapters three, four and five). From a policy process perspective Congress had a great deal more interest in Somalia than in Liberia concerning the threshold necessary for policymakers to focus on humanitarian issues.

Underlying causal factors also played a role in the varying degrees of implementation of international law with state law and the decision-makers formulation of foreign policy. The United Nations and various NGOs were also contributory factors in the intervention decisions. Therefore the legal rationale behind the framing of policy decisions concerning both conflicts stems from the interpretation of the information provided and identification of the principles represented by the humanitarian situation within domestic law. However because during this period there was no existing law or consensus which defined humanitarian intervention, it was necessary to determine by legal reasoning and applicable legal sources how those legal principles could be translated into policy to invoke action. This is not to say that the United States interpreted human rights differently from the international community. It was necessary though for the United States to identify

⁸⁵⁰ Thesis:167.

those rights and seek applicable law to provide an enforcement mechanism for the legitimate use of military force.

This application of domestic law is essential when the interpretation of international legal principles is dependent on a state's interpretation for application.⁸⁵¹ Liberia and Somalia are excellent examples of the interplay between international law and state domestic law in the formation of foreign policy and how the rules of international law, and therefore effectiveness, often compete when analysed from the domestic legal perspective. In this way, the state's legal interpretation acts as a mechanism for the effectiveness of international law. In that the effect of international law on foreign policy allocates the rules of international law to rely on domestic law for implementation and affords those international rules political authority at the state level. This is evident given that international organizations do not have a mechanism for enforcement capacity.

Therefore as this thesis contends the interpretation of international legal rules is dependent on a state's interpretation of those rules for application as prescribed within the domestic legal framework. This corresponds to Dworkin's argument on the role of sources in law and Tomuschat's dependent legitimacy theory on international law, corroborated by Besson with regard to the 'so-called dependence condition of

⁸⁵¹ Thesis, Section One.

legitimacy’⁸⁵² discussed in chapter one. It is also compatible with neoclassical realism’s assertion on the interaction between the state and its position in the international system as discussed in chapter five of this thesis.

Lastly, the consequences of Somalia were reflected subsequently in the events in Rwanda. By May 1994, when the genocide in Rwanda began, Clinton enacted PDD25,⁸⁵³ wherein the United States maintained its non-intervention policy for which it was criticised on two counts. First, the United States allowed France to take the lead in the Rwanda intervention and second, violated its own domestic and international legal obligations by not intervening in the genocide.⁸⁵⁴

Furthermore, the death of the United Nations peacekeepers in Somalia also had a restrictive effect on the United Nations, specifically concerning the risks that could be assumed during peacekeeping operations and in respect to the interpretation of mandates. This was of particular importance to the conduct of UNAMIR, the United Nations Assistance Mission for Rwanda. An analysis of the conflicts in Rwanda in 1994 and Côte d’Ivoire in 2002 follows.

⁸⁵² Besson 2014:38.

⁸⁵³ Public Law 103-335 (1994).

⁸⁵⁴ A copy of the full text can be found in International Legal Materials (ILM) available on Westlaw [online]. See also, Ware (1997) “The Emerging Norm of Humanitarian Intervention and Presidential Decision Directive’ 25”.

France: Rwanda & Côte d'Ivoire

Beginning in the 1800s, France had viewed post-colonial Africa as an exclusive sphere of influence or *pré carré*.⁸⁵⁵ After colonial independence in 1960 France maintained an influence on francophone African leaders and continued its *pré carré* relationship.⁸⁵⁶ France's foreign policies in Africa have been considered constant since the government of Charles de Gaulle.⁸⁵⁷ The significance of de Gaulle's policies is the extent to which they generated a set of norms that have shaped French behaviour toward Africa.⁸⁵⁸ President de Gaulle fought for a strong military presence and political influence in many African states imposed through both bilateral cooperation and defence agreements.⁸⁵⁹ Most of these agreements still exist today, although some remain state secrets.⁸⁶⁰ This influence was garnered to not only generate support in the international arena but to also secure privileged access to natural resources and key markets.⁸⁶¹ In many ways it has therefore

⁸⁵⁵ Touati 2007; Krief 2006.

⁸⁵⁶ Ibid., see also: Daniel Bourmaud 'France in Africa: African Politics and French Foreign Policy' (1995) no. 2 *Issues: A Journal of Opinion*, 23; 1993 Rapport de la Commission Internationale D'Enquete Sur Les Violations des Droits de l'Homme au Rwanda Dupuis (1993) (The Report is in French and can be downloaded from the United States Institute of Peace website <http://www.usip.org/files/file/resources/collections/commissions/Rwanda93-Report.pdf>).

⁸⁵⁷ For various accounts of French foreign policy continuity see: Jean-Charles Savignac *Les Administrations de la France* Masson 1995; Philip G. Cerny *Une Politique de Grandeur. Aspects Idéologique de la Politique Extérieure de De Gaulle* Flammarion 1986; Philip G. Cerny *Review of 'A Certain Idea of France: French Security Policy and the Gaullist Legacy'* Philip H. Gordon Paris 1994..

⁸⁵⁸ Ibid., and Marchal 2009.

⁸⁵⁹ Ibid.

⁸⁶⁰ During decolonisation de Gaulle offered a package to the new African states. France provided protection in the form of technical, military and financial assistance. In return the francophone states would back France's international policies. Marchal 2009, 2013; Bagayoko-Penone 2009; Touati, 2009; Andreggen 1994; Westfall 1992; Chafer 1985. See also, 'Mitterrand et l'Afrique' in *Politique Africaine*, n°58, June 1995 (special edition).

⁸⁶¹ Ibid.

“often proved difficult to draw the (local-international) line clearly between French and African institutions.”⁸⁶² Two events demonstrate the political and material price of these policies, the conflicts in Rwanda in 1994 and Côte d’Ivoire in 2002.

⁸⁶² Charbonneau 2014:616.

10. Rwanda: Opération Turquoise (1994)

France Relations with Rwanda

Rwanda, as a French-speaking state, enjoyed a very privileged relationship with France. Civilian cooperation between France and Rwanda started in October 1962 with the signing of the general agreement of friendship and cooperation in cultural, technical and economic fields.⁸⁶³ In December 1962, three further definite agreements were signed, specifying the nature of the French intervention in each of these fields.⁸⁶⁴

In 1975, with the signing of a special military assistance agreement (*Accord Particulier d'Assistance Militaire*)⁸⁶⁵ between President Juvénal Habyarimana and President Valéry Giscard d'Estaing, Rwanda entered into its *pré-carré* relationship with France. The main goal of the agreement was to offer technical assistance in the development of a national police force. The agreement included one key clause that explicitly prohibited French involvement in military and police affairs.⁸⁶⁶

In 1983, the agreement was revised and the clause was removed during Christophe Mitterrand, son of President Mitterrand, position as head of the African Cell in the Elysée.⁸⁶⁷ The Elysée is considered the most

⁸⁶³ Marchal 2009, 2013; Bagayoko-Penone 2009; Touati, 2009; Andreggen 1994; Westfall 1992; Chafer 1985.

⁸⁶⁴ Olivier Lanotte *La France au Rwanda (1990-1994) Entre abstention impossible et engagement ambivalent* P.I.E. Peter Lang S.A. 2007.

⁸⁶⁵ Savignac 1995; Cerny 1986; Cerny 1994; Lanotte 2007.

⁸⁶⁶ Ibid.

⁸⁶⁷ Touati 2009; Lanotte 2007.

powerful institution on French African policy.⁸⁶⁸ The agreement was again amended in 1992.⁸⁶⁹ As a result, and aided by various co-operation agreements, both military and non-military, France was able to establish a permanent French presence in Rwanda.⁸⁷⁰

The 1994 genocide in Rwanda marked a turning point for French foreign policy in francophone Africa.⁸⁷¹ Subsequent reports and hearing records have stated that despite knowledge of human rights abuses France continued to support the Rwandan government under the 1975 military assistance agreement (as amended in August 1992).⁸⁷² In 1997 France established a non-intervention policy towards Africa and folded many of its African missions into multinational operations.⁸⁷³

Background to the Rwanda Civil War and Genocide (1990-1994)

Colonized by Germany in 1899, Rwanda became a Belgian colony after the First World War (1916-1961).⁸⁷⁴ The Germans and, especially the

⁸⁶⁸ Assemblée nationale Mission d'information commune Tome 1 Rapport, 26-27. "Much was made of the change since the revised agreement later provided the legal justification for direct French military assistance to the Rwandan army" [translated], Ibid:28; see also: le Bureau du l'Assemblée Nationale, section b) Les modifications apportées à l'accord initial: cet accord particulier sera modifié à deux reprises, en 1983 et en 1992 [online].

⁸⁶⁹ Ibid.; and Westfall 1992.

⁸⁷⁰ Ibid.; and Chafer 1985.

⁸⁷¹ Dallaire 2004; Bourmaud 1995; the Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda 1999 [online].

⁸⁷² Ibid.

⁸⁷³ *The Economist* 1993, Vol. 326, Iss.7800:42 (author: anonymous). "UN authorises Opération Turquoise to protect displaced persons" *United Nations Report*, United Nations Chronicle Archives, Volume 4, 1994 [online]. It is now public knowledge, and as was printed in *Le Monde* on 6 July 2007, declassified government memos and diplomatic telegrams revealed Mitterrand's support for the Habyarimana regime.

⁸⁷⁴ Marchal 2009, 2013; Bagayoko-Penone 2009; Touati, 2009; Andreggen 1994; Michel Chossudovsky and Pierre Galand 'L'usage de la Dette Extérieure du Rwanda (1990-1994), La Responsabilité des Bailleurs de Fonds, Analyse et Recommandations'

Belgians, transformed Rwanda's royal governing structure to suit their administrative needs, creating a Tutsi rule and a rigid ethnic classification system.⁸⁷⁵ This caused division amongst the Rwandan population. In 1933, the Belgians introduced compulsory ethnic identity cards. In 1959 the Hutu majority rebelled against the Tutsi. The Hutu elite then came into power.⁸⁷⁶ In 1961 Rwanda was to finally gain independence from Belgium. The transition was not peaceful however due to the fact that Belgian colonial rule had created resentment and inferiority among the Hutu towards the Tutsi population. Following independence from Belgium relations with France developed with the friendship of French President Mitterrand and the Hutu Rwandan President Habyarimana.⁸⁷⁷

Despite ethnic violence, the Hutu's dominated Rwanda until 1990. In a coup attempt in October 1990 the Tutsi Rwandan Patriotic Front (RPF) crossed the border from Uganda.⁸⁷⁸ The assault was stopped when a French commando unit sent on the instructions of Mitterrand, reinforced the Habyarimana government's army. Civil war ensued.⁸⁷⁹ From October 1990 Rwanda endured three and one-half years of violent conflict. France continued to provide political and military support for

in *Projet RWA/95/005 Réhabilitation des Capacités de Gestion de L'Economie* Cage Publishers 1997.; Dallaire, 2004; Westfall 1992.

⁸⁷⁵ Ibid.

⁸⁷⁶ Ibid.

⁸⁷⁷ Ibid.

⁸⁷⁸ The Rwandan Patriotic Front was formed of Tutsis refugees and was also forty percent Hutu (Ibid). Joel Stettenheim *The Arusha Accords and the Failure of International Intervention in Rwanda* 2000:2 (<http://legacy.wilsoncenter.org/subsites/ccpdc/pubs/words/8.pdf>. accessed 19 November 2009; 31 March 2011).

⁸⁷⁹ Chossudovsky 1997; Stettenheim 2000:2-10.

Habyarimana's Hutu government as it increased the number of advisers sent into Rwanda.⁸⁸⁰

In early 1993 the RPF and the Rwandan government met to negotiate a peace settlement. The Arusha Accords were signed in August 1993.⁸⁸¹ As part of the Accords and at the request of both parties to the Accords, the United Nations Security Council agreed in October 1993 to establish the United Nations Assistance Mission for Rwanda (UNAMIR, Resolution 872).⁸⁸² UNAMIR, commanded by Roméo Dallaire, was mandated to monitor the implementation of the ceasefire and oversee implementation of a transitional government and the merger of the two armies.⁸⁸³ Despite the Accords ethnic violence increased, further fuelled by Hutu extremists who opposed the power-sharing arrangement.⁸⁸⁴

After the victory of the RPF, the Security Council adopted Resolution 918 which authorized the expansion of UNAMIR forces to 5,500 (officially UNAMIR II) and remained in Rwanda until 8 March 1996.⁸⁸⁵ Despite international assistance and political reforms, including Rwanda's first local elections held in March 1999, Rwanda continues to

⁸⁸⁰ According to documentation, Rwanda at the time of the attack by RPF, 'was characterized by a persistent institutionalized policy of ethnic and regional discrimination, a serious economic and social crisis, corruption and political violence'. *Conflict History of Rwanda* 1995; Chossudovsky 1997; Stettenheim 2000:2-10 establishes a timeline leading to the civil war.

⁸⁸¹ Stettenheim 2000.

⁸⁸² United Nations Security Council resolution 872, (S/RES/872 (1993). <http://www.un.org/documents/sc/res/1992/scres92.htm>.; Dallaire 2004.

⁸⁸³ Ibid.

⁸⁸⁴ Stettenheim 2000; Dallaire 2004.

⁸⁸⁵ Ibid.

struggle.⁸⁸⁶ In 2001, the government began the genocide trials. During this period the United Nations set up the International Criminal Tribunal for Rwanda, based in Arusha, Tanzania.⁸⁸⁷

The Genocide

In April 1994 the peace process broke down when Habyarimana's personal plane, a gift from Mitterrand, was shot down upon its return to Rwanda, killing Habyarimana and all aboard.⁸⁸⁸ Habyarimana's assassination set off a violent reaction and fighting broke out within hours. The next day the prime minister was murdered in her home along with ten Belgian peacekeepers. The peacekeepers were tortured before they were killed.⁸⁸⁹ On 8 April 1994, the extremist forces turned their attention to civilians. Over a three month period, nearly one million people were massacred in a planned genocide.⁸⁹⁰ This count does not include the gender-targeted crimes which included rape and other forms of sexual violence. Tutsi women in particular were targeted with the

⁸⁸⁶ Chossudovsky and Garland 1997 Chossudovsky, 1997; 1993 Rapport de la Commission Internationale (91-92); Africa Watch, Centre Internationale des droits de la personne et du développement démocratique, Fédération internationale des droits de l'Homme, Union interafricaine des droits de l'Homme et des peuples.

⁸⁸⁷ 1993 Rapport de la Commission Internationale; 1999 Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda[online].

⁸⁸⁸ Ibid., and Dallaire 2004

⁸⁸⁹ Radio station RTLM began a rumour accusing Belgium of having shot down the presidential plane (1999 Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda [online]).

⁸⁹⁰ Dallaire 2004; A US intelligence analyst noted in late April 1994: "the [extremist] plan appears to have been to wipe out any RPF ally or potential ally. ... No end to the unprecedented bloodshed is yet in sight" ('Roots of Violence in Rwanda' US Department of State, Bureau of Intelligence and Research, Intelligence Assessment, April 29, 1994 [Library of Congress Archives]).

intent of destroying their reproductive capabilities.⁸⁹¹ This strengthened the Hutu's concept of ethnic cleansing.⁸⁹²

The genocide proved too dangerous for the United Nations. This led to the evacuation of all foreign nationals and the European component of UNAMIR.⁸⁹³ The African division remained. On 17 May 1994, the United Nations finally accepted that "acts of genocide may have been committed."⁸⁹⁴ In late June 1994, the French government launched Opération Turquoise to provide a safe zone for Hutu refugees.⁸⁹⁵ Opération Turquoise saved thousands of lives yet it has also been considered controversial due to accusations that its mandate undermined the United Nations Assistance Mission for Rwanda (UNAMIR) and was considered a failed attempt to support the Hutu regime, which France had been supporting against the RPF.⁸⁹⁶

The local Rwandan news media played a crucial role in the genocide while the international media either ignored or seriously misconstrued

⁸⁹¹ Human Rights Watch (1996). "Shattered Lives: Sexual Violence during the Rwandan Genocide and its Aftermath." *Human Rights Watch/Africa*.

⁸⁹² Obote-Odora 2005; "Rape and Sexual Violence in International Law: ICTR Contribution" *New England Journal of International and Comparative Law*, 12(1):135.

⁸⁹³ Stettenheim 2000:3-4.

⁸⁹⁴ 1999 Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda [online].

⁸⁹⁵ "UN authorises Opération Turquoise to protect displaced persons", United Nations Report (Volume 4, 1994); see also Thesis footnote 865.

⁸⁹⁶ This statement is confirmed in both the 1999 Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda [online] and the "Rapport de la Commission Internationale D'Enquete Sur Les Violations des Droits de l'Homme au Rwanda Depuis le 1^{er} Octobre 1990 (7-21 janvier 1993)" [online]; Viret 2011; Stettenheim 2000:2-10; Georges Martres, French Ambassador to Rwanda, Telegram dated 27 October 1990 (Tome 1 Rapport:135 et French dossier, cf2, archives, p.85, 107-111 www.assemblee-nationale.fr/dossiers/252_fr/wanda252ftelechar).

events during the conflict.⁸⁹⁷ From the beginning, Rwanda's government understood the significance of using the media to unite Rwandans with the government.⁸⁹⁸ This was particularly important given that a large number of Rwandans could not read or write.⁸⁹⁹ The *Rapport de la Commission Internationale* established in March 1992 that Radio Rwanda was used to directly promote the killing of Tutsi for propaganda by the president's party, Mouvement révolutionnaire national pour le développement (MRND).⁹⁰⁰ Supporters of the MRND and of the Coalition pour la défense de la République (CDR) "relied on both [Radio-Télévision Libre des Milles Collines] and Radio Rwanda to incite and mobilize, then to give specific directions for carrying out the killings," after the Arusha Accords were signed.⁹⁰¹

⁸⁹⁷ The international media first ignored the reports on the mass killing and then mainly misinterpreted the genocide as another example of "African savagery and long simmering ethnic hatred (Robert 2011 [online]); Emmanuel Viret *Rwanda - A Chronology (1867-1994)*, Online Encyclopedia of Mass Violence 1 March 2010, Sciences Po, CERI (<http://www.massviolence.org/Rwanda-A-Chronology>).

⁸⁹⁸ 1993 Rapport de la Commission Internationale (the Report is in French and can be downloaded from the United States Institute of Peace website). Fédération Internationale des Droits de l'Homme, Union Interafricaine des Droits de l'Homme, and International Centre for Human Rights and Democratic Development. 1993:13-14.

⁸⁹⁹ Ibid.

⁹⁰⁰ 1993 Rapport de la Commission Internationale (the Report is in French and can be downloaded from the United States Institute of Peace website). Fédération Internationale des Droits de l'Homme, Union Interafricaine des Droits de l'Homme, and International Centre for Human Rights and Democratic Development. 1993:13-14. see also Robert 2009; J.P. Chrétien, J.P., J.F. Dupaquier and M. Kabanda *Rwanda: les médias du génocide* Karthala 1995:51-53.

⁹⁰¹ International Criminal Tribunal for Rwanda (ICTR), 2003, *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case no. ICTR-99-52-T: Judgement and sentence. Arusha, Tanzania, 3 December; 2003, paragraph 4.2; RTLM transcripts: 13, 29 April; 15, 20 May; 1, 5, 9, 19 June 1994 (this information can be downloaded from the Frederick K. Cox International Law Center War Crimes Research Portal).

The humanitarian crisis finally garnered international attention once Hutu refugees began to pour out of Rwanda into neighbouring countries. This was followed with verified reports of the genocide.⁹⁰²

The Humanitarian Situation of the Rwandan Conflict and Genocide

Over the course of approximately one hundred days, nearly one million people had been brutally killed, and approximately two million refugees had crossed Rwanda's borders in the largest exodus of displaced persons in modern history.⁹⁰³ Large numbers of the population had been tortured and wounded and many women, as well as children, had been raped and tortured, some becoming infected with AIDS.⁹⁰⁴ Survivors of the genocide were scattered throughout the state and severely traumatised.⁹⁰⁵ Approximately two million Hutus, fearing anticipation of Tutsi retaliation, fled from Rwanda, dying in refugee camps.⁹⁰⁶ In 1994, the Government of Rwanda began rebuilding the collapsed state.⁹⁰⁷

⁹⁰² Ibid; International Federation of Red Cross and Red Crescent Societies (2005) "Humanitarian media coverage in the digital age" in *World disasters report 2005*. IFRC, Geneva, Switzerland.

⁹⁰³ 1993 Rapport de la Commission Internationale. The Report also acknowledges a number atrocities, "[a]ll of which were publicly reported throughout the early 1990s by 'credible human rights organizations'" (Ibid.); Report of the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions August 1993 [online]; see also Bourmaud 1995; Viret 2010; Marchal 2009, 2013; Bagayoko-Penone 2009; Touati, 2009.

⁹⁰⁴ Ibid.

⁹⁰⁵ "Rwanda: Poverty Reduction and Sustainable Growth" World Bank Report 12465, 16 May 1994; Chossudovsky and Garland 1997; Chossudovsky 1997; Matthew J. Vaccaro 'The Politics of Genocide: Peacekeeping and Disaster Relief' in Durch, William J. (ed) *Rwanda in UN Peacekeeping, American Policy, and the Uncivil Wars of the 1990s* MacMillian 1997.

⁹⁰⁶ Statement of Bernard Kouchner, co-founder *Médecins sans frontières*; March 1993; Report of the International Commission of Inquiry into Human Rights Abuse in Rwanda [online]; August 1993 Report of the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions [online].

⁹⁰⁷ Ibid.

French Policy toward the Rwandan Conflict

It has now been generally acknowledged that the French intervention in Rwanda was predominantly an attempt by France to keep the francophonie intact and was indicative of military intervention towards Africa in its foreign policy.⁹⁰⁸ Pursuant to existing formal bilateral agreements and informal security commitments towards the Habyarimana regime, France intervened to protect French nationals and other foreigners. France also intervened to prevent a victory of the rebellion as it had on other occasions in Francophone African states of its *pré-carré*.⁹⁰⁹

Even though France engaged in diplomatic pressures in order to prevent military escalation and violations of human rights, discrepancy in policy indicates that the most controversial point was the decision to maintain a *guarantee of security* (emphasis added).⁹¹⁰ This was done by generally dismissing the increasing reports of serious human rights abuses, despite the drift towards genocide.⁹¹¹ These discrepancies coincide with declassified government memos and diplomatic telegrams revealing Mitterrand's support for the Habyariman government. The documents confirmed that the French government was aware of ethnic cleansings

⁹⁰⁸ Assemblée Nationale, Mission d'information commune, Tome 1, Rapport, 25 [online] ; see also: "Rwanda genocide: France was at fault, Sarkozy admits" (*The Guardian*, 25 February 2010).

⁹⁰⁹ Thesis footnote 896.

⁹¹⁰ Lanotte 2007:362-374, 235-245.

⁹¹¹ Ibid.

committed by Hutus extremists as early as February 1993, one year before the assassination of Habyarimana which triggered the genocide.⁹¹²

In October 1990, following the RPF invasion from Uganda into Rwanda, French policy towards Rwanda was committed to support the Habyarimana regime against an “Anglophone conspiracy and in defence of the French role in Africa.”⁹¹³ As the military weakness of Rwanda’s government became apparent the Africa Unit in the Elysée and the Military Assistance Office in the Ministry of Cooperation embarked on a policy to build up the Forces Armées Rwandaise (FAR). Officially France sent more than twenty-five million francs worth of arms to Rwanda between 1990 and 1993 and the French military assistance unit in Kigali provided training and operational guidance to Habyarimana’s army.⁹¹⁴

When later questioned about the supply of arms, the French government argued that the supply of arms was legal.⁹¹⁵ That in accordance with French policy, and as specified under the 1975 *Accord Particulier d’Assistance Militaire*, and as amended in August 1992, France was following customary alliance politics. Moreover, pursuant to the *Accord*

⁹¹² Lanotte 2007:494.

⁹¹³ Truheart 22 April 1998:7; Statement of Admiral Jacques Lanxade Assemblée nationale, Mission d’information commune, Tome 3, vol. 1, 198, 368 and Tome 3, vol. 2, 223. The French government continued to support Habyarimana, given that “[t]he Habyarimana regime was rather respectful of human rights, reports of massacres were ‘just rumours’ the RPF was responsible for the massacres” (1990 Assemblée nationale, Mission d’information commune, Tome 1 Rapport, 26-28 [online]) .

⁹¹⁴ Dallaire 2004; Bourmaud 1995; Simons 1994; Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda, 15 December 1999 [online]. See also, Smolar 2007;.

⁹¹⁵ Otunnu 1999:38; Lanotte 2007:399-401; Ibid.

and other informal security commitments, France considered itself to be legally bound to support an ally.⁹¹⁶

Following the RPF invasion Mitterrand began to by-pass parliamentary procedure regarding all decision-making.⁹¹⁷ To do this he continuously downplayed and restricted information received. This began in the early days of the conflict when the Defence attaché stationed in Kigali, Colonel Jacques Galinié, sent several messages which requested increased military support for the Rwandan army and also mentioned the possibility of genocide against Tutsis.⁹¹⁸ Other military dispatches protected by defence confidentiality also show that France knew the risk of mass massacres against Tutsis had occurred. In addition some of the violations were documented in the French parliamentary report itself.⁹¹⁹

Despite reports submitted to the French Government by Amnesty International (1992) and five major Rwandan human rights associations (1993) describing the ‘ongoing cycle of violence’,⁹²⁰ France announced in February 1993 that it was sending more troops to Rwanda. This was quickly followed by Bruno Delaye and the director of African Affairs at

⁹¹⁶ 1993 Rapport de la Commission Internationale [online]; 1993 Report of the UN Special Rapporteur on Summary, Arbitrary and Extrajudicial Executions. Martres pointed out in the telegram “that the terms of the 1975 Agreement had been amended by the existing situation on the ground. France accepted the proposed amendment and endorsed it on 26 August 1992” (*Les modifications apportées à l'accord initial : cet accord particulier sera modifié à deux reprises, en 1983 et en 1992*).

⁹¹⁷ Georges Martres, telegram dated 27 October 1990 (1990 Tome 1 Rapport, p:135 et French dossier, cf2, archives 107-111 [online]); and Assemblée nationale, Mission d'information commune, Tome 3, vol. 1 198 and Tome 3, vol. 2, 223 [online]; and la Constitution française.

⁹¹⁸ Ibid; and Stettenheim 2000. (For purposes of this thesis and from a legal point of view this amounts to an exclusion of evidence.)

⁹¹⁹ Thesis footnote 908.

⁹²⁰ Piotr Smolar « Génocide rwandais: ce que savait l'Elysée » Article publié le 02 Juillet 2007 [Archives Le Monde, Paris, France]; Otunnu 1999.

the Quay d'Orsay, Jean-Marc De La Sablière, departure to Kigali. Upon their return from Kigali, Delaye reported "on the position and differences in opinion between the president and his Prime Minister."⁹²¹

During the crisis situation (the genocide) the Elysée cell met every day.⁹²² Pierre Joxe (former defence Minister) stated "that considerable more information about the tensions and risks associated with the civil war were discussed. Written documentation attests to this."⁹²³ During these daily meetings Mitterrand continued to restrict information and policy advice put forth concerning the information gathered on the situation. He was also informing decisions that were not agreed upon, including the Arusha Accords and Opération Turquoise.⁹²⁴

France was important in pushing Habyarimana to negotiate the Accords. The French government concluded that "a negotiated settlement was the best way for France to salvage its interests in Rwanda."⁹²⁵ Edouard Balladur (former Prime Minister) writes that "Mitterrand stated that it was necessary for the French government to intervene pursuant to its responsibilities."⁹²⁶ However, Balladur made it clear to Mitterrand that he opposed the objectives of the French military intervention in

⁹²¹ Assemblée nationale, Mission d'information commune, Tome 3, vol. 1, 198 [online].

⁹²² Ibid; and 1993 Rapport de la Commission Internationale [online]; Lanotte 2007:225-245.

⁹²³ Le mission d'information parlementaire sur le Rwanda [online]; and 1999 Report of the Independent Inquiry.

⁹²⁴ 24 February 24 1993, letter to President François Mitterrand (French dossier, cf2, archives :85, 107-111).

⁹²⁵ Assemblée nationale, Mission d'information commune, Tome 1 rapport, 322.

⁹²⁶ Lanotte 2007:239.

Opération Turquoise.⁹²⁷ Balladur further specified that there was never an accepted collective decision by the Elysée regarding the intervention.⁹²⁸ From this point France's foreign policy was shaped by competitive internal tension among the decision-makers. The result was a dual policy that supported the Arusha negotiations but simultaneously built up the Rwandese armed forces and accepted the regime politically.⁹²⁹

Of further concern was the role of the international community. The United Nations Assistance Mission for Rwanda (UNAMIR), granted under Chapter 6,⁹³⁰ was mandated to monitor the ceasefire and oversee the implementation of the Arusha Accords; but had no authority to act in a peace enforcement role, to impose the agreement, or to protect human rights.⁹³¹ From a French legal and policy perspective, by positioning itself between the two warring parties and by monitoring the border between Uganda and Rwanda, UNAMIR would restrain the RPF and provide breathing space for the Rwandan government. This allowed France to exercise some influence after its own troops were gone. The government of Rwanda, which had been elected to the Security Council, supported France on this issue.⁹³²

⁹²⁷ "The Prime Minister opposed President Mitterrand's aggressive option and gave five conditions for deployment of Opération Turquoise." Tome 1 Rapport, p:135 ; Georges Martres, French dossier, cf2, archives, p;85,107-111 [online]; also dans la Mission d'information de la Commission de la Défense Nationale et des forces Armées et de la Commission des Affaires Étrangères, sur les opérations militaires menées par la France, d'autres pays et l'ONU au Rwanda entre 1990 et 1994.

⁹²⁸ Ibid.

⁹²⁹ Stettenheim 2000:5-10.

⁹³⁰ Resolution 872 (1993) ([https://undocs.org/S/RES/872\(1993\)](https://undocs.org/S/RES/872(1993))); Dallaire 2003:67.

⁹³¹ Dallaire 2003:73; Lanotte 2007.

⁹³² Bourmaud 2005; 1993 Rapport de la Commission Internationale [online].

Despite early warnings from human rights organizations and witnesses in Rwanda, France a permanent member of the Security Council, never discussed the potential genocide with other Security Council members.⁹³³ Records indicate that no deliberations were held concerning the potential genocide “although there was considerable evidence available that if the level of intervention was not increased, the result would be a major genocide.”⁹³⁴ On 21 April 1994, the Security Council voted to withdraw all but a few troops of UNAMIR. In addition, France, as well as Britain and the United States, as members of the Security Council, vetoed the implementation of the 1948 Genocide Convention that would have allowed UNAMIR to be expanded.⁹³⁵

In 1994, under José Ayala Lasso, the United Nations Human Rights Commission was instrumental in beginning the process of establishing facts and qualification of the genocide.⁹³⁶ This was followed by the report of René Degni-Sgui, the Special Rapporteur for Rwanda, which confirmed the genocide.⁹³⁷ During this same period reports from international organisations and those from UNAMIR corroborated the facts revealed in other reports and affirmed with no ambiguity that the

⁹³³ In May 1992 Amnesty International stated that “representatives of the Rwandan government as well as members of the security forces belonging to the Hutu ethnic majority continue to condone and to commit human rights violations directed primarily against the Tutsi minority” (1993 Rapport de la Commission Internationale [online]); 1999 Report of the Independent Inquiry [online]; also see UNSC Resolution 955 ([https://undocs.org/S/RES/955\(1994\)](https://undocs.org/S/RES/955(1994))) which established the International Criminal Tribunal for Rwanda: (<https://web.archive.org/web/20100530045733/http://www.icttr.org/>).

⁹³⁴ Ibid.

⁹³⁵ Ibid.

⁹³⁶ Ibid.

⁹³⁷ 1999 Report of the Independent Inquiry [online].

regime was implicated in the organisation of the massacres.⁹³⁸ The United Nations began to respond to the Rwanda conflict and “called upon the Security Council to take forceful action in Rwanda.”⁹³⁹

The *Inquiry into the Actions of the United Nations* reported that the Security Council overtly omitted genocide from its proceedings because it did not wish to engage directly in Rwanda (this is reflected in Resolution 918).⁹⁴⁰ It was not until Resolution 925 that the Security Council used the term genocide for the first time.⁹⁴¹ In spite of this recognition the Security Council did not translate the use of force into practice nor were there any acts of immediate assistance. The diffusion of hate propaganda in Rwanda was also an indicator of increasing tension and the mounting genocide.⁹⁴²

Opération Turquoise

Faced with delay from the Security Council following Resolution 918, to send UNAMIR II and increase its troops, and concerned with its image in aiding the Habyarimana regime, France announced on 15 June 1994 that it would intervene to stop the killing.⁹⁴³ The French-led Opération

⁹³⁸ ICHR Report March 1993; UN Special Rapporteur Report August 1994.

⁹³⁹ 1999 Report of the Independent Inquiry [online]; see also Statement made by the President of the Council on 30 April 1994 (S/PRST/1994/21).

⁹⁴⁰ Ibid.; S/RES/918 (1994) 17 May 1994 ([https://undocs.org/S/RES/918\(1994\)](https://undocs.org/S/RES/918(1994))).

⁹⁴¹ S/RES/925 (1994) 8 June 1994 ([https://undocs.org/S/RES/925\(1994\)](https://undocs.org/S/RES/925(1994))).

⁹⁴² 1993 Rapport de la Commission Internationale [online]; 1999 Report of the Independent Inquiry into the Actions of the United Nations During the 1994 Genocide in Rwanda [online]. See also *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze*, Case no. ICTR-99-52-T: Judgement and sentence, Arusha Tanzania 3 December 2003.

⁹⁴³ Ibid.

Turquoise was a mission conducted with the authorization of the Security Council, although not under United Nations command.⁹⁴⁴

The decision to launch Opération Turquoise was the result of various pressures placed upon the French executive, both internally and externally. Externally was the issue of the effect on French public opinion concerning the Government's role in the genocide.⁹⁴⁵ Internal pressure centred on the decision to intervene which was in the context of a political debate between Mitterrand, Balladur the Prime Minister and Juppé the Minister of Foreign Affairs. Balladur opposed Mitterrand's aggressive option for deployment of Opération Turquoise.⁹⁴⁶

In his hearing, dans le Mission d'information parlementaire sur le Rwanda, Balladur stated that "it is correct that some leaders envisaged a military intervention in the form of interposition [which] may have involved an act of war led by the French troops on foreign soil."⁹⁴⁷ Balladur specified that he had opposed it and felt that "he was not responsible for punishing the Hutu perpetrators of the genocide nor was he responsible for allowing the latter to take shelter in Zaïre."⁹⁴⁸

⁹⁴⁴ 'UN authorises Opération Turquoise to protect displaced persons' Report of the United Nations, United Nations Chronicle Archives, Vol 4 (1994) (<http://www.un.org/chronicle>).

⁹⁴⁵ Kouchner statement (Bernard Kouchner - Press communiqué "La responsabilité sociale et environnementale d'Areva est mise en cause par Sherpa, Médecins du Monde et CRIIRAD" (2012) <http://www.medecinsdumonde.org>. [accessed 9 November 2009].

⁹⁴⁶ French dossier, cf2, archives, p:85 ;107-111 [online]; et le Rapport de la Mission d'information parlementaire sur le Rwanda [online].

⁹⁴⁷ Ibid.

⁹⁴⁸ Ibid.; Thesis footnote 933.

Juppé aligned himself with Mitterrand.⁹⁴⁹ African pressures were also exerted upon France and especially on Mitterrand, regarding France's African policy. Conversely, for French purposes, the mission was to put an end to the massacres as an incentive for the Forces Armées Rwandaise to restore their authority (the Forces Armées Rwandaise were the actors responsible for the genocide).⁹⁵⁰

Foreseeing the possible problems Opération Turquoise (Resolution 929) might cause UNAMIR II, The UN Secretary-General intervened in support of authorization for Opération Turquoise. "One such difficulty was the perceived imbalance between the mandate of UNAMIR, which remained a Chapter 6 operation throughout, and the Chapter 7 authorization given to Opération Turquoise"⁹⁵¹ (Resolution 929), which France itself wrote.⁹⁵²

According to the United Nations mandate, any hostile military contact between soldiers of Opération Turquoise and FPR was to be avoided. France was ordered to remain neutral between the parties to the conflict.⁹⁵³ The intervention succeeded in saving thousands of Tutsi

⁹⁴⁹ In his hearing dans le Mission d'information parlementaire sur le Rwanda, Juppe, then Foreign Minister, specified that the government was unanimously of the opinion of a humane intervention (French dossier, cf2, archives, pp:107-115 [online]).

⁹⁵⁰ Ibid.

⁹⁵¹ Smolar 2007; Chossudovsky and Galand 1997; Lanotte 2007; 1999 Report of the Independent Inquiry [online].

⁹⁵² Ibid.

⁹⁵³ However, reports indicate that military confrontations took place with the soldiers of the FPR around 2 July 1994. Ibid., French dossier, cf2, archives [online].

lives “but it also provided for the safe exit of many of the Hutu allies of France involved in the genocide.”⁹⁵⁴

Causal Factors Affecting International Law on the Policy Process

The Decision-makers’ Arguments for Foreign Policy Rationale: Based upon its historical relationship with Rwanda, France assumed a basic position of intervention in Rwanda. This position was adopted for several reasons. First, Africa is integrated into the French Constitution and as such was a high priority issue area.⁹⁵⁵ Second, defence of France’s African sphere of influence was (until recently) a key pillar of French foreign policy.⁹⁵⁶ Third, the general foreign policy approach was one of intervention pursuant to existing formal bilateral agreements and informal security commitments towards the Habyarimana regime.⁹⁵⁷ Discrepancy in policy indicates that the most controversial point was the decision to maintain a *guarantee of security* despite the genocidal nature of the civil war.⁹⁵⁸

The Domestic Legal Framework: Both the constitutional and legal framework on human rights existed but was overlooked given that Mitterrand restricted information on behalf of Habyarimana’s

⁹⁵⁴ Le Rapport de la Mission d’information parlementaire sur le Rwanda [online]; Cameroon Douala « La France et l’Afrique: Décoloniser sans s’auto-décoloniser » dans *Le Messager*, 27 September 2005.

⁹⁵⁵ Le Rapport de la Mission d’information parlementaire sur le Rwanda [online]; les Constitution par la Français Article 87 [online]; et la Commission des Affaires Étrangères d’autres pays et l’ONU au Rwanda entre 1990 et 1994 [online].

⁹⁵⁶ Thesis:267-69

⁹⁵⁷ Thesis:275-76.

⁹⁵⁸ Thesis:274-75.

government.⁹⁵⁹ Aside from the Constitution and Civil Code there were also existing formal bilateral and defence agreements, including informal security commitments gave France legally sufficient reason to intervene.⁹⁶⁰

Actions of the United Nations: Although reports citing the humanitarian crisis were first issued in 1992, the United Nations did not address the Rwanda crisis as genocide until early 1994.⁹⁶¹ Prior to this UNAMIR (1993) was mandated to monitor the ceasefire and oversee the implementation of the Arusha Accords but had no authority to protect human rights.⁹⁶² More troops were requested but in April 1994 the Security Council voted to withdraw all but a few troops of UNAMIR. Taking this vote, and others concerning Rwanda, as a Rwandan representative of the Habyarimana government sat amongst them as a non-permanent member.⁹⁶³ Finally the Security Council gave Opération Turquoise a Chapter 7 authorization (June 1994) to provide a safe zone in the southwest corner of Rwanda.⁹⁶⁴

Legal Analysis of the Causal Factors

As anticipated in Chapter Two, the Rwanda crisis presented a legal conflict for France between human rights and its ties to Africa.⁹⁶⁵ In analysis of the causal factors influencing the policy process on the role of

⁹⁵⁹ Thesis:284-85.

⁹⁶⁰ Thesis:268-69.

⁹⁶¹ Thesis:294-97.

⁹⁶² Thesis:279.

⁹⁶³ Thesis:280.

⁹⁶⁴ Thesis:283-84.

⁹⁶⁵ Thesis:66; 84.

international law, the research finds that international law's effectiveness determined military operations as mandated by the United Nations. At the same time however, because international law and intervention were part of French constitutional and civil law, implemented through its foreign policies, the decision-makers until 1994 and particularly Mitterrand, instigated intervention in an opposing fashion.

In the case of Rwanda, France interpreted human rights protection with the Habyarimana regime to protect its sphere of influence.⁹⁶⁶ While making its case for intervention, France recognised the legal nature of the underlying international principles at issue but basically overlooked information due to French policy in safeguarding francophone regimes. Mitterrand, as well as the international community, would have considered this position legally legitimate because it was based on prior defence and cooperation agreements with Rwanda. This rationale corresponds to France's pre-existing law at the time. This oversight was further exacerbated by the United Nations and the Security Council's failure to address the Rwanda crisis as genocide until early 1994, a factor which clearly influenced how the language of foreign policy was constructed.⁹⁶⁷ This is illustrated in Resolution 929, Opération Turquoise, which France itself wrote in an attempt to restore authority to the Forces Armées Rwandaise. As a result, France basically interpreted

⁹⁶⁶ Thesis:277-78; 280.

⁹⁶⁷ Thesis:283.

international law in a way that matched French, as well as United Nations', interests at the time.⁹⁶⁸

As in the case of Somalia, there was no existing law or consensus at the international level which defined humanitarian intervention and thus there was no obligation for intervention decisions. Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948 would have substantiated legal authority, although at the time there was no precedent for the use of Chapter 7 in circumstances concerning genocide at the international level. (This does not place the genocide into a non-legal status.)

Based on these observations, its historical relationship with Rwanda and because humanitarian intervention is a core mission for French foreign policy, French decision-makers adopted a basic position of military intervention in Rwanda throughout the civil conflict. In that, France maintained its legal formalist approach by insisting on the primacy of its domestic law. In doing so its legal scope and limitations were in conflict, which significantly coloured the obligations of France to Rwanda and the rights of civilians in the armed conflict.

France's legal scope is witnessed pursuant to the 1975 Accord Particulier d'Assistance Militaire, and other informal security commitments. The 1992 amendment to the agreement later provided the legal justification

⁹⁶⁸ Thesis:285-86.

for direct French military assistance to the Rwandan army,⁹⁶⁹ which in essence exacerbated the nature of the conflict. In formulating these agreements both France and Rwanda were guided by their own interests and needs. As a result, the establishment of the agreements and security commitments did not always correspond to the actual objective requirements of the relevant international legal principles. Due to the extent of the agreement France considered itself to be legally bound to support an ally.⁹⁷⁰

In an opposing fashion, the agreement also established a limited legal effect in that France was bound in its support of an ally which led to internal Ministry arguments. In addition, constitutional positioning of the applicable principles of human rights was underscored because human rights protection is placed with the Habyarimana regime, which is significant given France's failure to discuss the potential genocide with Security Council members.⁹⁷¹

Specific limitations call attention to Mitterrand whom by-passed parliamentary procedure and informed decisions that were not agreed upon. This was highlighted by internal Ministry debate on Opération Turquoise which the Prime Minister viewed as inappropriate to French law, arguing that it was based in colonialism. It is further evidenced by

⁹⁶⁹ Assemblée nationale, Mission d'information commune, Tome 1 Rapport, 26-27; Truheart (22 April 1998,7).

⁹⁷⁰ Thesis, p: 279-80.

⁹⁷¹ Thesis, p:283.

accusations that Opération Turquoise's mandate undermined the United Nations Assistance Mission for Rwanda (UNAMIR).⁹⁷²

Rwanda's francophone status during Opération Turquoise reflected the increasing frustration of France's inability to deal with pending political reforms, and its own legal status within Rwanda. The frustration rested on the fact that Rwanda's rebel force was free to determine independence through means of internal conflict. To intervene in Rwanda would have necessitated a level of neutrality on France's behalf. Instead the tension between humanitarian intervention and sovereignty, sovereignty as defined by France's (Mitterrand) defence of its *pré-carré* status, created political problems for France's policy-makers and operational dilemmas on the ground for its military. A tension which underscores the theme of this thesis, discussed previously in section four.

This tension was witnessed in France's necessity to intervene pursuant to what France considered to be its legal responsibilities in Rwanda. Thus, what appears to have mattered most were not the particulars on the human rights abuses, but rather the legal-political culture of the policymaking process in the French government based upon traditional sphere-of-influence politics and the legality of bilateral cooperation and defence agreements. France's earlier actions in Rwanda may have been guided by a will to bring stabilisation to the state, but the purpose behind Opération Turquoise was to maintain an army in Rwanda.

⁹⁷² Thesis:281-82; Thesis footnote 865.

Whether the decision to intervene hindered or promoted the perceptions of the decision-makers' concerning security is difficult to determine, since both international law and Africa are incorporated into domestic sources of law in France. While the Rwandan media sources played a crucial role in the 1994 Rwanda genocide, the media had little effect on France's decision-making.⁹⁷³ Although humanitarian intervention created an agenda of reference for its policy makers, France's security perceptions were not based on its attention to the need for human rights issue at hand but instead were based on the protection of the Habyarimana government. This protection was enhanced by France's legal right to intervene as previously established.

Norm restriction is particularly evident since the issue of human rights was compromised due to the failure to incorporate the facts of the conflict and place those facts in the necessary context for use of force. A key element in this respect was the decision to maintain a guarantee of security despite the genocidal nature of the civil war.⁹⁷⁴ The guarantee of security operated between Rwanda's humanitarian concerns and France's foreign policy, which in effect constrained the principles of international law toward the civil war. While at the same time, the guarantee of security also allowed France to maintain some degree of

⁹⁷³ Thesis:275.

⁹⁷⁴ Thesis:292; see also Lanotte 2007:362-374, 235-245.

control over the situation in Rwanda based on the military weakness of Rwanda's government as determined by France.⁹⁷⁵

As determined by neoclassical realism, in France's interpretation of human rights protection, French laws effectively weakened the influence of humanitarian concerns in the course of foreign policy. This is not to say that state interests did not play a role, but without application of French legal sources and what France deemed appropriate legal reasoning, foreign policy objectives – military intervention - could not have been met. Again, French justification is witnessed in l'Accord Particulier d'Assistance Militaire and rationale in its continued support of the Habyarimana government.⁹⁷⁶ Right or wrong, and as hypothesised in chapters two and six, French foreign policy obeyed fixed legal rules regarding the course of action to be taken during the Rwanda crisis.

As with the United States case studies in the previous chapters, several additional possible rationales specific to Rwanda are considered to further verify how international law becomes legally applicable in its interaction with state law to inform foreign policy. An analysis of Rwanda shows two further rationales for intervention can be explained relative to the causal factors. First, it is unlikely that France could have prevented the Rwandan genocide given its history of intervention in Africa, established in France's legal sources and strategic use of legal reasoning for policy purpose. Second, the United Nations was unable to

⁹⁷⁵ Ibid.

⁹⁷⁶ Assemblée nationale, Mission d'information commune, Tome 1 Rapport, 26-28 [online].

authorize any action because it avoided any contextualisation relating to the genocidal accounting of human rights abuse;⁹⁷⁷ thus allowing France to position itself between state and international levels of law.

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It has been established that Africa is incorporated into the 1958 French Constitution and defence of France's African sphere of influence was (until recently) a key pillar of foreign policy.⁹⁷⁸ This can be witnessed in constitutional positioning and existing formal bilateral military and cooperation agreements. As previously stated, although there were earlier warnings suggesting genocide, policy rationale based upon French legislature and its Civil Code determined that Habyarimana sought French military protection due to aggression considered as foreign.

Foreign policy also included the protection of French nationals. In providing military assistance to the Habyarimana government during a time of war, France was following customary alliance politics, although there was no international arms embargo on Rwanda at the time.⁹⁷⁹ The use of force through training and arms transfers from France to Rwanda was based upon bilateral agreements as set forth in 1975 and as amended, and thus, as France argued, was technically legal. Until the signing of the Arusha Accords France argued that it employed the right

⁹⁷⁷ Thesis:283-84.

⁹⁷⁸ Les Constitution par la Français Article 87 (The French Constitution of 1958 [online]).

⁹⁷⁹ Thesis:278-79.

of sovereign states to give military aid to an ally's government facing a rebel force. The bilateral agreements, Constitution and Civil Code provided France with the necessary legal justification to interpret intervention into its domestic policy and as a legal basis to intervene. Moreover, as provided by legislature, military assistance was not exceptional practice in the overall context of French involvement in Africa at the time.

The assertion of the right of sovereign states to provide military aid to a friendly government facing a rebel force also provided France with the necessary principle of international law to sustain its domestic intervening presence. For France the necessity of upholding its legally binding military agreements was based upon the fact that France (Mitterand) felt it had to be vigilant against a perceived rebel force against a francophone zone.⁹⁸⁰ This sovereign state position resulted in a dual policy that supported the Arusha negotiations but simultaneously built up the Rwandan armed forces; as well as support for Habyarimana's regime. The duality in policy also led to policy discrepancy concerning the reports of genocide.⁹⁸¹ As a result, the way foreign policy was expressed, through France's own legal perspective, compromised the human rights issues because of the failure to interpret and incorporate the facts of the conflict in an appropriate manner.

⁹⁸⁰ Thesis:66,151,267.

⁹⁸¹ Thesis:281.

The United Nations itself was unable to authorize any action because it avoided any contextualisation relating to the genocidal accounting of human rights abuse; thus allowing France to position itself between state and international levels of law.

Despite the foundation of “international peace and security”⁹⁸² both France’s foreign policy and the United Nations (amongst others) compromised the human rights issues in Rwanda due to failure to incorporate the facts of the conflict and place those facts in the necessary context to use force. The United Nations and the Security Council carefully avoided contextualisation of the term genocide.⁹⁸³ This had the affect of separating the actual severity of the crime of genocide as a contributory factor necessary for a decision to use force. In addition, the actions undertaken during the civil war were neither criticised nor condemned. While it could be argued that the mechanisms for intervention relevant to genocide were not expressly articulated, the situation as expressed qualified as genocide in terms of Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide of 1948. As a consequence the use of force would have been justified, despite the fact that there was no precedent for the use of Chapter 7 in circumstances concerning genocide.

The failure to recognise the genocide at the international level (and vis-à-vis the state level) can be determined by several underlying factors. First, there was the refusal to accept the facts of the case based upon its legal principles. Although the United Nations had been alerted to the

⁹⁸² Charter of the United Nations, Article 2(4) in Evans 2006:9.

⁹⁸³ Thesis:283.

impending genocide by various international human rights organizations, the United Nations did not address the Rwanda crisis as genocide until early 1994. Much like Mitterrand, the United Nations and the Security Council continuously downplayed information received regarding any form of genocide, although human rights abuse was acknowledged.

Thus, the Security Council condemned the massacres of civilians by using legal terms which define genocide, without actually identifying genocide. This had the effect of isolating the violations of genocide from the civil war and destabilising legal principles of law, both domestic and international. This also had the effect of substantiating France's established domestic legal position. An underlying rationale for this was preceded by the deaths of United States soldiers in Somalia and the Belgian peacekeepers in Rwanda.⁹⁸⁴ When the Security Council was finally called upon to take action in Rwanda, it was cautiously supportive but notably made no mention of the genocide. The Security Council took this vote, and others concerning Rwanda, at the same time as a Rwandan representative of the Habyarimana government sat amongst them as a non-permanent member.

Whatever the role of the Security Council, there could have been no illusions about the situation in Rwanda. As General Christian Quesnot, then head of military affairs for the French Presidency, told the French internal parliamentary legislative inquiry following the genocide in Rwanda: "political as well as military leaders understood immediately

⁹⁸⁴ Thesis 276.

that we were headed towards a massacre far beyond any that had taken place before.”⁹⁸⁵

Second, the fact that Rwanda was represented by the Habyarimana government and was a member of the Security Council from January 1994, constituted a conflict of interest in the Security Council’s handling of the Rwanda issue.⁹⁸⁶ That a party to the civil war in question was on the agenda of the Security Council and the host state of a peacekeeping operation, which was later subject to an arms embargo imposed by the Security Council, shows the effect of France’s membership on the Council. For all intent and purposes Rwanda had full access to the discussions of the Security Council and as such had the opportunity to attempt to influence decision-making on its own behalf.

This conflict of interest is evident in the duality of the sovereign non-intervention principle and its attention to human rights, i.e., UNAMIR, which remained a Chapter 6 operation throughout, and the Chapter 7 authorisation given to Opération Turquoise. Two operations in the same conflict area with the authorization of the Security Council but with diverging powers could only be viewed as problematic given the nature of the factors presented and the course of Security Council votes. This allowed France to position itself between state and international law by monitoring the border between Uganda and Rwanda. UNAMIR would restrain the RPF and Opération Turquoise would provide a safe zone for

⁹⁸⁵ Thesis footnote 966.

⁹⁸⁶ Thesis 280.

refuges while at the same time facilitate the safe exit of the Rwandan government.

Third, a final rationale may have been the inability to establish genocide in the required legal context. Separation of the severity of the crime of genocide from the facts of the case, discussed previously in this chapter, would have clouded issues surrounding the necessity of establishing intent, pursuant to the guidelines established in the Genocide Convention. This factor may also have been strengthened by Rwanda's seat on the Security Council, which hindered responsibility for law and order and the security of civilians in areas under its control. Similarly, however, if intent had been established it would have legally obligated the international community to take action since genocide is codified as a legitimate reason to override United Nations Article 2.7.

Of further importance are issues of legality concerning international law's inability to support the Genocide Convention on its own. The Genocide Convention does not impose a legal requirement to take action to stop genocide.⁹⁸⁷ Article 8 interpreted states that a contracting party *may* call upon the competent organs of the United Nations to take action to suppress genocide, but that is not legally required.⁹⁸⁸ Therefore, it only requires interpretation and passage by state legislation to prohibit genocide. Based upon this interpretation, lack of enforcement, by Security Council members, had the effect of weakening international

⁹⁸⁷ 1948 *Convention on the Prevention and Punishment of the Crime of Genocide* [online].

⁹⁸⁸ Ibid.

law's effectiveness within the international and domestic decision-making process because legal structures both restrained and empowered each state. Once again this establishes, as set out in chapter one, that international legal principles are dependent upon the state's legal interpretative process and operates between humanitarian concerns and foreign policy as defined by neoclassical realism. Consequently, as this thesis argues the allocation of power in the decision-making process is witnessed within a state's domestic legal structures. This allocation of power supports the effectiveness (or ineffectiveness) of international law in foreign policy.

Humanitarian Intervention as a Legal Instrument for Foreign Policy

In France the recognition of humanitarian intervention as a legitimate practice and, therefore, its legal status is part of the decision-making process. Consequently interaction is commonplace. Rwanda represents a case where the foreign policy objective was to provide humanitarian assistance and security. Based on this objective a foreign policy decision to support a United Nations mandate recognised and legitimately applied military assistance (use of force) to the principle of human rights. However the interpretation and application of genocide within the domestic decision-making process did not happen. As a result, the way policy was expressed compromised the protection of human rights at issue due to the failure of the decision-makers to incorporate all the facts associated to the civil war. This lack of application reduced the legal pressure on behalf of the French government to participate or impart any

level of military participation relating to the gross violations of human rights abuses. In effect the allocation of the rules of international law reliant on domestic law for implementation was not afforded political authority at the state level.

In Rwanda there was a clear need for France to interpret the international norm of genocide within its domestic legal framework for enforcement purposes. As expected however this reflects that change or interpretation in the French legal system will only be made where disparities are present. In this case, France adhered to legal principles established in the French Constitution and bilateral agreements. France's legal structures, based on its established legal tradition and sources of law, made the interpretation and application of genocide difficult. Consequently the legal status of humanitarian intervention as a domestic concern and thus an instrument of foreign policy relied upon its francophone status in Rwanda. In addition, Rwanda necessitated a level of neutrality on France's behalf but instead the tension between humanitarian intervention and sovereignty created problems; a tension which underscores the theme of this thesis, and was discussed previously in chapter seven.

Finally, as in Liberia, evidence would suggest that both international law and domestic law could be interpreted as insufficient to protect core human rights values. When assessing the interpretation of human rights to the domestic legal framework in the formulation of intervention, one

must consider deliberate non-enforcement regarding the aspects of genocide.

11. Côte d'Ivoire

France Relations with Côte d'Ivoire

Based upon its Françafrique status, France had held a long-standing relationship with Côte d'Ivoire since 1893 when Côte d'Ivoire was made a French colony.⁹⁸⁹ From 1904, Côte d'Ivoire was run as an overseas territory by the French Third Republic.⁹⁹⁰ Governors appointed in Paris administered the colony of Côte d'Ivoire until 1958, using a centralized administration that restricted Ivoirian participation in policy-making.⁹⁹¹ Following independence in 1960 France and Côte d'Ivoire maintained positive relations. These relations later deepened based upon the friendship of Presidents Houphouët-Boigny and Mitterrand. This resulted in the 1961 agreement of cooperation entitled l' Accord d'Assistance Militaire Technique, outlining French-Ivoirian relations and securing a permanent presence for France in Côte d'Ivoire; as well as a Defence Pact signed in 1970 and additional cooperation agreements which included judicial affairs and technical and military assistance.⁹⁹²

⁹⁸⁹ Bourmaud 1995; Loucou 1994; Jean Noël Loucou 'Côte d'Ivoire: les résistances à la conquête coloniale' (2007) Abidjan: CERAP ; Marchal 2009, 2013; Bagayoko-Penone 2009; Touati, 2009.

⁹⁹⁰ Ibid.

⁹⁹¹ Ibid.

⁹⁹² Loucou 2007:31-33; Bourmaud 1995; Koné 2003; US Department of State, Bureau of African Affairs:Cote d'Ivoire 2010 Report. See *Liste des Accords de Défense ou de Coopération Militaire de La France en Vigueur* dans le « Politique intérieure » Encyclopædia Universalis [online].

Like his predecessor Charles de Gaulle, Mitterrand had retained foreign affairs as part of the “*pré carré*” status of the President.⁹⁹³

The Rwandan conflict however significantly affected France’s credibility in Africa and in 1995 on the instruction of President Jacques Chirac;⁹⁹⁴ France established a non-intervention policy towards Africa.⁹⁹⁵ From thereafter France’s strategic approach to Africa was built upon RECAMP, le Renforcement des Capacités de Maintien de la Paix, a French peacekeeping agenda for Africa.⁹⁹⁶ Nevertheless following the coup attempt of Ivoirian President Laurent Gbagbo, France, under Chirac’s instructions, deployed troops to protect French nationals in September 2002. This was followed in 2004 by Force Licorne (Opération Licorne), independent of the United Nations.⁹⁹⁷

Background to the Côte d’Ivoire Conflict (2002 - ongoing)

After achieving independence from France in 1960 Côte d’Ivoire enjoyed political stability and economic success.⁹⁹⁸ Following the death of Houphouët-Boigny in 1993 and predicated upon policy decisions initiated by his successor, Henri Konan Bédié, Côte d’Ivoire experienced

⁹⁹³ Koné 2003; Bourmaud 1995; and *Côte d’Ivoire, Modern Legal Systems Cyclopedia*, 6 250 8:18, 1990.

⁹⁹⁴ Chirac served as President of France from 1995 to 2007 and as Prime Minister from 1974 to 1976 and 1986 to 1988 (Bourmaud 1995; Marchal 2009, 2013).

⁹⁹⁵ Création d’une force africaine pour la prévention et le règlement des conflits, 10^e législature 1994; see also Renforcement des Capacités Africaines de Maintien de la Paix; Touat 2007.

⁹⁹⁶ La politique africaine de la France 1995 Une Modernisation des Instruments de la Coopération (“Recamp Renforcement des Capacités Africaines de Maintien de la Paix, The New Foreign Legion” *Africa Confidential*. Vol. 42, No. 10, 18 May 2001.

⁹⁹⁷ Opération Licorne, under the *Opération des Nations Unies en Côte d’Ivoire*, UNOCI (S/RES/1528 (2004).

⁹⁹⁸ Loucou 1994; Bourmaud 1995; Marchal 2009, 2013.

two coups, one in 1999 and another in 2001.⁹⁹⁹ The ongoing conflict began in 2002 and has caused destabilisation and instability throughout the state. Although most of the armed conflict ended in 2004, the current phase of the conflict remains unpredictable. The ongoing instability relates to the definition of citizenship (who can stand for election as President) voting rights and representation in government.¹⁰⁰⁰

Under the leadership of Houphouët-Boigny (1960 to 1993) Côte d'Ivoire's religious divide was united and the country developed a thriving economy. In 1990 political opposition parties were legalized in an effort to democratize the state. Houphouët-Boigny won the first contested election, beating the candidate from the Ivoirian Popular Front (IPF) Laurent Gbagbo.¹⁰⁰¹

Following Houphouët-Boigny's death in 1993, and as written in the state constitution, Henri Konan Bédié President of the National Assembly, took over the presidency.¹⁰⁰² Bédié created the concept *Ivoirité*, used to differentiate between *real* Ivoirian citizens and the *others*, which increased ethnic tensions in Côte d'Ivoire.¹⁰⁰³ In 1995 Bédié added a clause to the constitution that Ivoirian presidential candidates must be

⁹⁹⁹ Koné 2003; "Côte d'Ivoire, Library of Congress Country Studies" 2013; and "Report of the UN Secretary-General on the United Nations Mission in Côte d'Ivoire, 3 August 2003 [online]".

¹⁰⁰⁰ Loucou 1994; 2007; Koné 2003; "Côte d'Ivoire, Library of Congress Country Studies" 2013; and "Report of the UN Secretary-General on the United Nations Mission in Côte d'Ivoire, 3 August 2003 [online]".

¹⁰⁰¹ Koné 2003; Arnim Langer *Horizontal inequalities and violent conflict: the case of Côte d'Ivoire* CRISE Working Paper No. 13, Oxford 2004:24-25; La Documentation Française: Côte d'Ivoire: une succession manquée 2011 [online].

¹⁰⁰² Koné 2003 ; Langer 2004 :25-26.

¹⁰⁰³ Ibid.

Ivoirian citizens and requiring both parents to be Ivoirien.¹⁰⁰⁴ In 1999, economic pressures resulted in a coup attempt and Bédié was forced to flee to France.¹⁰⁰⁵

After the 1999 coup, under the government of General Guei, a new constitution was drafted and ratified in 2000.¹⁰⁰⁶ The new constitution retained a number of clauses which emphasised the ethnic, religious and territorial divisions within Côte d'Ivoire.¹⁰⁰⁷ Elections were scheduled to take place in the autumn of 2000, but tensions increased when Guei's "introduced new eligibility criteria for presidential candidates."¹⁰⁰⁸ This disqualified Alassane Ouattara and his party Rassemblement des Republicaines (RDR).¹⁰⁰⁹ When early polling results showed Gbagbo in the lead, Guei stopped the election process and declared himself the winner. Within hours street demonstrations and fighting began.¹⁰¹⁰ Gbagbo was declared President but the RDR called for new elections in which their candidate (Ouattara) could stand. More violence erupted when on "29 October the massacre of Yopougon was uncovered" in

¹⁰⁰⁴ Langer 2004:25-26; Koné 2003; «Henri Konan Bédié » Encyclopædia Universalis [en ligne] <http://www.universalis.fr/encyclopedie/cote-d-ivoire-actualite-1990-2008/>.

¹⁰⁰⁵ «Vie économique» Encyclopædia Universalis: <http://www.universalis.fr/encyclopedie/cote-d-ivoire-actualite-1990-2008/>.

¹⁰⁰⁶ Langer 2004:25-29.

¹⁰⁰⁷ Langer 2004:28-30; Mamadou Koulibaly *La guerre de la France contre la Côte d'Ivoire* Harmattan 2003.

¹⁰⁰⁸ Langer 2004:30.

¹⁰⁰⁹ Langer 2004:30; US Department of State 2010; La Documentation Française: Côte d'Ivoire:une succession manquée (2011online); Politique intérieure 2008 [online].

¹⁰¹⁰ Politique intérieure 2008 [online]; 2003 Report of the UN Secretary-General on Côte d'Ivoire; Reporters without Borders Annual Rapport Côte d'Ivoire 2003; Loucou 2004.

Abidjan.¹⁰¹¹ Hundreds were killed before Ouattara called a truce and recognised the Gbagbo presidency.¹⁰¹²

Another coup was attempted on 7 January 2001 to overthrow Gbagbo, but failed and those involved were forced into exile.¹⁰¹³ In August 2002 Gbagbo formed a de facto government that included the RDR party; thereafter violent armed conflict ensued in September 2002 and incurred the split in party ties.¹⁰¹⁴ In order to limit the violence and resolve the political differences, France and ECOWAS mediated between the government and the rebel forces. In late October 2002 French troops were dispatched into the region.¹⁰¹⁵ Following diplomatic lobbying by the French government and the international community, the warring parties signed a compromise Agreement in Linas-Marcoussis on 23 January 2003.¹⁰¹⁶ The Agreement was not respected and intense fighting broke out again.

The bombing of France's peacekeeping force (Opération Licorne) by Gbagbo's army in November 2004 and the necessary reaction of France to ensure protection, strained relations between France and Côte d'Ivoire significantly.¹⁰¹⁷ Although most of the fighting ended in 2004 the state remains divided in two, with the Forces Nouvelles ruled by the north and

¹⁰¹¹ Langer 2004:30.

¹⁰¹² Balint-Kurti 2007:14.

¹⁰¹³ Ibid.; Langer 2004.

¹⁰¹⁴ Langer 2004 32 ; «La Côte d'Ivoire en crise». Encyclopædia Universalis; 2004 Institute for Security Studies [online]; *La crise en Côte d'Ivoire, Dossiers d'actualité* [online].

¹⁰¹⁵ Ibid., see also Koulibaly 2003.

¹⁰¹⁶ Langer 2004:32-33; «Linas-Marcoussis accord» Encyclopædia Universalis.

¹⁰¹⁷ Langer 2004:25-26; Koné 2003; Koulibaly 2003.

Gbagbo's government controlling the south.¹⁰¹⁸ Efforts to advance a peace process have still not met with success. In November 2006 Security Council Resolution 1721 extended the transitional government's mandate and tasked it with completing the peace process by October 2007.¹⁰¹⁹ In 2011 "the polarisation effects over the debates between humanitarian intervention ... produced a further divide between international and local actors, thus reproducing discursive strategies of interpretation of military intervention as either humanitarian or imperialist."¹⁰²⁰ As of June 2014 the Security Council continues to mandate the UNOCI operation. The renewed 2014 mandate reinforces the role of the Special Representative of the Secretary-General concerning the political processes underway in Côte d'Ivoire.¹⁰²¹ It further notes that the security situation remains fragile as well as threats to civilian safety.¹⁰²² Finally, pursuant to the UN website, in January 2015 the Security Council is scheduled to hold further consultations on Côte d'Ivoire.¹⁰²³

The Humanitarian Situation of the Côte d'Ivoire Conflict

To date, the humanitarian issues remain unresolved and are attributable to both sides of the conflict.¹⁰²⁴ Government forces and French

¹⁰¹⁸ Ibid.; Koulibaly 2003.

¹⁰¹⁹ Security Council Resolution: S/RES/1739 (2007) 10 January 2007.

¹⁰²⁰ Charbonneau 2014:608; See *What's in Blue* 2016 UN website online for recent Security Council reports confirmation of this. (Further confirming the objectives of this research).

¹⁰²¹ 24 June 2014, UN Security Council, *What's in Blue* (UN website [online]).

¹⁰²² Ibid.

¹⁰²³ 23 December 2014 Security Council Monthly Forecast, S/2014/892 (UN website).

¹⁰²⁴ Peter Takirambudde "Côte d'Ivoire The Human Rights Cost of the Political Impasse" Human Rights Watch (22 December 2005); also, UNOCI (S/RES/1528 (2004 [online])).

peacekeeping troops were both reported to have used excessive force against demonstrators and civilian populations.¹⁰²⁵ In July 2007 the United Nations “suspended a Moroccan peacekeeping unit in Côte d’Ivoire following an investigation into allegations of sexual abuse.”¹⁰²⁶ One of the worst atrocities of the civil war was the mass deaths of dozens of gendarmes and their families.¹⁰²⁷ Human Rights Watch reported the continued subjection of women, girls, and boys in unreported incidents of sexual violence.¹⁰²⁸

Xenophobic hate speeches on public radios and news media continue to increase the ethnic tension between Ivoirians and foreign nationals.¹⁰²⁹ It has been reported that at least 700,000 people are currently displaced in government-held areas in the south and 1.7 million people are estimated to be internally displaced nationwide. Tens of thousands more have fled Côte d’Ivoire for other countries in the sub-Saharan region and beyond.¹⁰³⁰

French Policy towards the Côte d’Ivoire Conflict

The Rwandan conflict significantly affected France’s credibility in Africa. Because of this in 1997, on the instructions of President Jacques

¹⁰²⁵ Takirambudde 2005.

¹⁰²⁶ Ibid; *Côte d’Ivoire: A Succession of Unpunished Crimes*, Amnesty International, 27/2/03 [http://web.amnesty.org/library Index/ENGAFR310072003?open&of=ENG-CIV](http://web.amnesty.org/library/Index/ENGAFR310072003?open&of=ENG-CIV).

¹⁰²⁷ Ibid.

¹⁰²⁸ Takirambudde 2005.

¹⁰²⁹ As in Rwanda the political parties used the media as channels for propaganda with xenophobic hate speeches on local public radios which increased the ethnic tension between Ivoirians and foreign nationals (Reporters without Borders Annual Rapport, Côte d’Ivoire 2003; Loucou 2004).

¹⁰³⁰ Ibid.

Chirac, France established a non-intervention policy towards Africa and folded many of its African missions into multinational operations. France's strategic approach to Africa thereafter was built upon le Renforcement des Capacités de Maintien de la Paix (RECAMP), the French peacekeeping agenda for Africa.¹⁰³¹ RECAMP was developed to prevent the French army from being implicated in any intricate civil and ethnic wars.¹⁰³² Based upon its new policy of non-intervention and until the second attempted coup in 2002, France's position was to consider the crisis an internal issue for Côte d'Ivoire.¹⁰³³

Subsequently, in September 2002 following the outbreak of violence and requested assistance from the United Nations, France deployed troops in an attempt to rescue French and western citizens from the Ivoirian territory.¹⁰³⁴ French troops were again dispatched in October 2002 to monitor a cease fire and to mediate reconciliation between the parties to the conflict.¹⁰³⁵ On 18 October the rebels agreed to a ceasefire and Gbagbo called on the French to monitor the ceasefire citing the 1961 cooperation agreement and 1970 defence pact. Similar to the agreements instituted between France and Rwanda, Gbagbo insisted that France was

¹⁰³¹ Renforcement des Capacités Africaines de Maintien de la Paix:

<http://www.recamp.fr>.

¹⁰³² Touati 2007; Touati suggests that the new approach accepted the delegation of peacekeeping operations to African organisations such as the African Union, in that RECAMP and the French army helped to train African troops for placement into United Nations peacekeeping operations particularly concerning Côte d'Ivoire. See also Renforcement des Capacités Africaines de Maintien de la Paix [online].

¹⁰³³ Claude Wauthier 'France's African policies' (May 2003) *Le Monde diplomatique* <http://mondediplo.com/2003/05/11wauthier> [accessed 2 January 2013].

¹⁰³⁴ France and Côte d'Ivoire: Political Relations 2010 and 2014 [online]; La Documentation Française: Côte d'Ivoire 2011 [online].

¹⁰³⁵ As stated previously, there is currently no official published documentation from Paris on the Côte d'Ivoire conflict. Therefore, aside from the United Nations Reports, the information is predominately based upon secondary sources.

legally obligated to militarily defend its former colony from any external invasion.¹⁰³⁶ The French government however hesitated to commit to an explicit agreement to protect Côte d'Ivoire from an external invasion on the basis of which the conflict came from within the state.¹⁰³⁷

France's approach was also based on its peacekeeping agenda for Africa. Gbagbo's government called it a question of semantics and considered France's approach an insult to Ivoirian sovereignty.¹⁰³⁸ Gbagbo began to publicly insist that France should activate the 1961 bilateral defence accord.¹⁰³⁹ Regardless of its intentions France did monitor the ceasefire. France "cited the reason as the protection of French nationals" as rationale for monitoring the ceasefire and not the legal obligations Gbagbo insisted upon.¹⁰⁴⁰ France saw its position in Côte d'Ivoire as one of necessity since the alternative would be considered a policy of neglect, as well as a threat to national security.¹⁰⁴¹

The lack of knowledge towards the rebellion was mutually shared at the international level, but following the attempted coup the Economic Community of West African States (ECOWAS) intervened immediately.¹⁰⁴² This was in an attempt to mediate the political differences between the government and the rebel forces. Likewise, the

¹⁰³⁶ Koné 2003; Balint-Kurti 2007; Koulibaly 2003.

¹⁰³⁷ Ibid.

¹⁰³⁸ Ibid.

¹⁰³⁹ The 1961 bilateral defence accord reads: "if Côte d'Ivoire is threatened by another state, France would intervene" (La Documentation Française: Côte d'Ivoire 2011 [online]).

¹⁰⁴⁰ "France Got Them There" *The Economist*, 18 January 2003, p:50.

¹⁰⁴¹ La Documentation Française: Côte d'Ivoire [online]; "*Côte d'Ivoire*" *Modern Legal Systems Cyclopedia*, 6 250 8; Bagayoko-Penone 2009:171-173.

¹⁰⁴² Bagayoko-Penone 2009:169-173; Langer 2004; Loucou 2007.

United Nations was also quick to acknowledge the human rights situation as it could not ignore the possibility of another genocide occurring in Africa and began monitoring the situation.¹⁰⁴³ The International Committee of the Red Cross also responded to the human rights violations and informed parties to the conflict to comply with the rules of the international humanitarian law.¹⁰⁴⁴ This was followed by reports in December 2002, that French troops had discovered mass graves.¹⁰⁴⁵

Following reports from the United Nations the international media began to sporadically feature the violence in Côte d'Ivoire. Reporters without Borders repeatedly stated that the Western media gave biased reports based upon a lack of knowledge on Africa that had dangerous consequences.¹⁰⁴⁶

In November 2002, in furtherance of France's policy towards Côte d'Ivoire, the Minister of Foreign Affairs, "Dominique de Villepin, visited Côte d'Ivoire and held talks with the Ivoirian government."¹⁰⁴⁷ In January 2003 Minister de Villepin met again with Gbagbo and expressed the French government's concern about the increasing crisis and

¹⁰⁴³ Touati 2007.

¹⁰⁴⁴ 6 Dec 2002 ICRC urges respect for humanitarian law © ICRC ABIDJAN, 6 Dec 2002 (IRIN online).

¹⁰⁴⁵ "French troops discover mass grave in conflict-torn Ivory Coast ABIDJAN", 6 Dec 2002 (Agence France-Presse online).

¹⁰⁴⁶ Reporters without Borders, Annual Rapport, Côte d'Ivoire 2003.

¹⁰⁴⁷ Gberie and Addo 2004 (See Thesis footnote 316).

humanitarian issues.¹⁰⁴⁸ He further stated to Gbagbo that France was not supporting either side in the conflict.¹⁰⁴⁹

After significant diplomatic advisement by de Villepin and ECOWAS, the warring parties signed the Linas-Marcoussis Agreement on 23 January 2003 in Paris.¹⁰⁵⁰ The principle provisions of the Agreement were “the creation of a government of national unity, the request for a joint France-ECOWAS peacekeeping force and the establishment of an international follow-up commission”¹⁰⁵¹ (le Comité de Suivi).¹⁰⁵² In its foreign policy, as stipulated pursuant to the 1961 cooperation agreement and 1970 defence pact, France maintained troops to monitor the ceasefire along with a force of troops through ECOWAS.¹⁰⁵³ On “4 February 2003 the United Nations Security Council adopted Resolution 1464, which legitimized the Linas-Marcoussis Agreement” and supported the continued French military operation Opération Licorne.¹⁰⁵⁴

Due to Gbagbo’s unwillingness to fully implement the Linas-Marcoussis Agreement, Franco-Ivoirian relations again began to deteriorate.¹⁰⁵⁵ The Forces Nouvelles were not compelled to follow the Agreement either, particularly if the fundamental provisions as set out in the Agreement

¹⁰⁴⁸ Ibid.

¹⁰⁴⁹ Ibid.

¹⁰⁵⁰ Langer 2004:32-33. “The French intervention was praised and criticized on many levels, by many sides” (Julio Godoy “*Africa Policy Loses its Way*” (6 November 2002) http://www.ipsnews.net/africa/Focus/conflict_prevention/note_6.shtml [accessed 29 July 2013]).

¹⁰⁵¹ Langer 2004:32.

¹⁰⁵² Ibid.

¹⁰⁵³ Ibid.; see also Lansana and Addo 2004.

¹⁰⁵⁴ Lansana and Addo 2004; UNSC S/RES/1464 2003; Security Council Press Release SC/7657 (04/02/2003).

¹⁰⁵⁵ Langer 2004:22.

were not met.¹⁰⁵⁶ The ceasefire was broken repeatedly. This angered the French. By February 2003, there were three thousand troops in Opération Licorne, which began initially in September 2002 independent of the United Nations to honour the 1961 agreements signed between France and Côte d'Ivoire.¹⁰⁵⁷

The mission of the Opération was in compliance with stated objectives in French policy and was substantiated by the Legal Council of the French government. The mission was also supported by Security Council Resolution 1479 on 13 May 2003, which established the Mission des Nations Unies en Côte d'Ivoire (MINUCI).¹⁰⁵⁸ The French force was mandated, among other things, to participate in the formation of security within the border zone (with Liberia) and to provide security for foreigners and evacuation when deemed necessary.¹⁰⁵⁹ On 27 February 2004, the United Nations Security Council established a peacekeeping mission in Cote d'Ivoire, the United Nations Operation in Côte d'Ivoire (UNOCI).¹⁰⁶⁰ In addition to United Nations peacekeepers and police officers, the mission was supported by French troops belonging to Opération Licorne, acting under Chapter 7 of the United Nations

¹⁰⁵⁶ Balint-Kurti 2007:20.

¹⁰⁵⁷ 'France Got Them There', *Economist* 2003.

¹⁰⁵⁸ <http://www.un.org/fr/peacekeeping/missions/past/minuci/>.

¹⁰⁵⁹ Although no official policy documents are available, Gberie's 2004 monograph on the challenges of peace implementation in Côte d'Ivoire indicates France's policy on use of force included "simple but detailed rules of engagement developed in close collaboration with the Legal and Political Council of the French government" (Gberie and Addo 2004:26).

¹⁰⁶⁰ United Nations Operation in Côte d'Ivoire (UNOCI)
<https://peacekeeping.un.org/en/mission/past/unoci/elections.shtml>.

Charter.¹⁰⁶¹ Opération Licorne effectively underscored the division of Côte d'Ivoire into two parts as armed conflict ensued throughout.¹⁰⁶²

It was also during implementation of the UNOCI mandate that anti-French demonstrations were taking place in Abidjan based upon accusations that France was taking sides. Gbagbo interpreted this as a non-implementation of the agreements of defense made with Côte d'Ivoire. This position contrasted with the rebels (Forces Nouvelles) who insisted France was preventing the capture of Abidjan.¹⁰⁶³ The media also played a role at this point, as scenes of French citizens forced from their homes in Cote d'Ivoire and French soldiers shooting at demonstrators were televised in both states.¹⁰⁶⁴ The situation grew worse with military actions carried out by the government in November 2004. Thereafter the Security Council imposed an arms embargo on Cote d'Ivoire.¹⁰⁶⁵

In response to France's assistance to the United Nations in protecting the Forces Nouvelles delegates, "the Ivoirian Air Force attacked a French

¹⁰⁶¹ S/RES/1528 (2004); Security Council Press Release SC/8012 (27/02/2004); and UN News Centre, "U.N. advisers expressed grave fears about ethnic violence in Côte d'Ivoire and Abidjan's ambassador to the United Nations warned that the West African nation was on the "brink of genocide" (UN Focus Information News Agency 2004).

¹⁰⁶² France's response force *Licorne* was sent in to protect the population and prevent another humanitarian crisis (*Jeune Afrique L'Intelligent*, n° 2322 du 10 au 16 juillet 2005); 'France in Africa:Mitterrand's muddle' 1993; Keith B. Richburg 'France Abandons Hands-Off Policy On Africa Conflicts: Some Fear Ivory Coast Quagmire *Le Parisien*, *Washington Post* (4 January 2003) [Oxford University Bodleian Library Archives].

¹⁰⁶³ Langer 2004:30; Koné 2003; Koulibaly 2003.

¹⁰⁶⁴ Ibid.

¹⁰⁶⁵ "Security Council imposes immediate arms embargo against Côte d'Ivoire", Security Council Press Release SC/8245 (15/11/2004).

military base.”¹⁰⁶⁶ France interpreted this as a threat to national security and French forces destroyed Ivoirian aircraft under the rules of engagement.¹⁰⁶⁷ Chirac’s order was to stop any further attacks against the French army and its citizens, and to prevent any further attacks by the government’s army against the Forces Nouvelles; which were contrary to the signed Agreement.¹⁰⁶⁸

Gbagbo’s supporters promptly turned on the French community. The Ivoirian 'hate media' spread continuous messages inciting the militias to attack French civilians.¹⁰⁶⁹ Efforts to resolve the conflict between the government and the rebels resulted in a succession of unfulfilled peace agreements. Although French peacekeeping forces remain in the state under a United Nations mandate, France is unwilling to organize another peace conference.¹⁰⁷⁰ As stated above, France is connected to Côte d'Ivoire through its governmental relations and cooperation and bi-lateral agreements, including military assistance in the form of defence treaties, which include secret clauses.¹⁰⁷¹ Since the agreements have not been officially absolved, this means that neo-colonial Françafrique continues to function even when government officials claim Françafrique status no

¹⁰⁶⁶ Ibid.

¹⁰⁶⁷ Gberie and Addo 2004:26.

¹⁰⁶⁸ Ibid., Loucou 2007; Koné 2003.

¹⁰⁶⁹ On 15 November 2003 Juan Mendez, the Special Advisor to the United Nations on Genocide, advised that the spreading messages of ethnic division and xenophobia broadcasted by the government media were in contradiction to international law (2003 Report of the Commission of Inquiry into the Events Related to the massacre in Abidjan (Côte d'Ivoire)).

¹⁰⁷⁰ Takirambudde 2005; Chirot 2006:68, 72-76; Security Council’s Update Report [No. 1] on Preventive Diplomacy and Conflict Prevention in Africa (14 July 2010).

¹⁰⁷¹ Robert 2009; Marchal 2009, 2013.

longer exists; notwithstanding France's approach to Africa with regard to RECAMP.

In 2007, according to Radio France International, France has "yet to officially revise or renegotiate the 'secret' and public defence treaties signed with a select number of African countries."¹⁰⁷² Policy critics allege that France uses this secrecy, as well as ambiguous definitions of what defines internal or external threats, to develop policy to intervene according to its own interests; even within an international framework. However, France sees its foreign policy position on Côte d'Ivoire as one of keeping Côte d'Ivoire out of the ranks of failed states since the alternative would be considered a policy of neglect. Consequently, France remains in Côte d'Ivoire under a United Nations mandate.¹⁰⁷³

Causal Factors Affecting International Law on the Policy Process

The Decision-makers' Arguments for Foreign Policy Rationale: Despite Chirac's policy of non-intervention, France's strategic approach with le Renforcement des Capacités de Maintien de la Paix, and its initial decision to not intervene in Côte d'Ivoire, France adopted a basic position of intervention.¹⁰⁷⁴ This position was adopted for several reasons. First, policy centred on the enforcement of the 1961 cooperation agreement and defence pact; and second, the fear of a possible repeat of genocide similar to Rwanda.¹⁰⁷⁵

¹⁰⁷² Godoy 2002.

¹⁰⁷³ Security Council 2010; Richburg 2003; Godoy 2002.

¹⁰⁷⁴ Thesis:308-09.

¹⁰⁷⁵ Thesis:310-11.

The Domestic Legal Framework: In hindsight following the Rwanda crisis, the interventions were deemed permissible given the particulars of the French Constitution and legal framework on human rights and use of force. Although employed initially pursuant to the existing bilateral cooperation and defence agreements. This proved to be a key aspect of Ivoirian-French legal cooperation on the use of force and gave France the necessary just cause (legal responsibility) to intervene. Policy also included legislature as developed through the Civil Code relevant to Chirac's non-intervention policy towards Africa.

Actions of the United Nations: Like France, the United Nations could not ignore the possibility of genocide and because of this was quick to acknowledge the human rights situation in Côte d'Ivoire.¹⁰⁷⁶ Although the United Nations repeatedly deferred to France on legal-political and military matters, it played a significant role in the conflict. As outlined in France's policy towards the conflict in Opération Licorne, Resolution 1464 authorized the deployment of an international peacekeeping force.¹⁰⁷⁷ To facilitate the implementation of the Agreement, United Nations Resolution 1479 was adopted (2003) which established the Mission des Nations Unies en Côte d'Ivoire (MINUCI). Finally, Resolution 1528 (2004) determined the situation in Côte d'Ivoire to be a

¹⁰⁷⁶ Thesis:279. 282.

¹⁰⁷⁷ Thesis:312.

threat to international peace and security in the region and established the United Nations Operation in Côte d'Ivoire (UNOCI).¹⁰⁷⁸

Legal Analysis of the Causal Factors

In analysis of the three causal factors influencing France's 2002 and 2004 interventions in Côte d'Ivoire the research finds that the principles of international law effectively determined military operations as mandated by the United Nations. Yet prior to this and based upon the 1961 bilateral cooperation agreement and the 1970 defence pact, the decision-makers in the early part of the civil war acted outside the basic international legal framework. This is observed in Opération Licorne, which began independent of the United Nations and was initiated to honour the defence agreements between Côte d'Ivoire and France.

In consequence, although intervention policy was constructed on principles of international law (human rights and use of military force) it was determined by the legal interpretation of Chirac's non-intervention policy and the cooperation and defence agreements at issue. Thus while making its case for non-intervention France identified the relevant underlying principles at issue but interpreted international law in a way that matched its own legal interests at the time, as one would expect. However as indicated, later policy decisions to use military force when read together with Security Council Resolution 1528 provided the legal

¹⁰⁷⁸ Thesis:304, 308, 313.

basis for French military action under international law.¹⁰⁷⁹ As a result, France adopted a basic position of intervention in Côte d'Ivoire given the ongoing nature of the civil conflict.¹⁰⁸⁰

As in Rwanda, Côte d'Ivoire presented a legal conflict for France. In this case however the conflict was between old legislature concerning protection of its *pré carré* and intervention and the development of the new legislature concerning non-intervention which suffered from a lack of clarity given the legislatures' dual agendas.¹⁰⁸¹

In an attempt to disengage from Côte d'Ivoire, France found itself in a perpetual power struggle in its former colony based upon intervention policy rationale.¹⁰⁸² France was further driven by traditional sources of international and French laws and the principle of self-defence. Based on traditional French sources of law, the interpretation of the use of force and/or human rights relied upon statutes as written for different administrations and when applied both statutes presented different functions during the application process. This produced inconsistency in foreign policy. It also created significant practical challenges to interpreting the responsibilities of protecting human rights in policy rationale. This was clearly observed when France assisted in facilitating the principles of the Linas-Marcoussis Agreement which escalated the

¹⁰⁷⁹ Thesis:307, 317.

¹⁰⁸⁰ Ibid.

¹⁰⁸¹ Thesis:310-11.

¹⁰⁸² Thesis 313, 323.

conflict and further exacerbated the xenophobic attacks on the French community by Gbagbo's supporters.¹⁰⁸³

In the positioning of traditional sources of international and French laws and its legal obligations to militarily defend its former colonies, France identified both its legal scope and its limitations. Legal scope lies with France's traditional method of interpretation of international law in French policy, given its authorization by long-standing domestic statute requirements.¹⁰⁸⁴ This was conditioned on several reasons: first, Africa is incorporated into the French Constitution and France sees its foreign policy position to Côte d'Ivoire as a sense of responsibility and domestic concern. Hence, France felt it was its responsibility to keep Côte d'Ivoire out of the ranks of failed states.¹⁰⁸⁵

Second, in France international law is treated the same as domestic law. In this regard, concerns of a possible repeat of genocide similar to Rwanda extended beyond the traditional legal scope of human rights and sovereignty. Although this gave a strong indication that France continued to reserve the right to unilateral action. France's legal scope is further witnessed pursuant to the 1961 Accord d'Assistance Militaire Technique, 1970 Defence Pact, and other informal security commitments which provided the legal justification for direct French military involvement.¹⁰⁸⁶

¹⁰⁸³ Thesis:312, 314, 324.

¹⁰⁸⁴ Thesis 320.

¹⁰⁸⁵ Thesis:315.

¹⁰⁸⁶ Thesis:268-70.

Unlike Rwanda, the decisions for use of force were developed in close collaboration with the Legal and Political Council of the French government.¹⁰⁸⁷ Meaning that interpretation of the intervention followed required procedure based upon existing treaties and was put before the Constitutional Council as part of the decision-making process to intervene in Côte d'Ivoire.¹⁰⁸⁸ This decision-making process gave the French executive, constitutional (statutory) authority to participate in and support United Nations peace operations. The policy also included legislature as developed through the Civil Code relevant to Chirac's non-intervention policy and French peacekeeping agenda for Africa (RECOMP).¹⁰⁸⁹ This legislature does however call attention to specific limitations.

In an attempt to buffer its legal obligations as outlined in the cooperation and defence agreements between France and Côte d'Ivoire with new legislature, France was unable to deal with its own legal status in Côte d'Ivoire. This is reflected in France's inability to sustain legitimate authority to broker the ceasefires, the initial protection of French nationals or reduce the level of humanitarian suffering. Due to ambiguity in policy there was no clear or uniform understanding of how international humanitarian concerns applied to French law in Africa and therefore foreign policy and state interests. Indeed, remember the cooperation and defence agreements were created during the de Gaulle

¹⁰⁸⁷ Thesis:313-14.

¹⁰⁸⁸ Ibid.

¹⁰⁸⁹ Thesis 270, 303.

presidency and maintained during the Mitterrand presidency as part of the *pré carré* status and the preservation of France's special relationships with its former African colonies.¹⁰⁹⁰ Thus, de Gaulle and Mitterrand produced legislature that Chirac did not consider applicable to state interests during his presidency.¹⁰⁹¹ These ambiguities in legislature created significant practical challenges to interpreting the responsibilities of France to Africa under international law because both presented as different functions during the application process in the formulation of foreign policy.

Whereas it is possible as a matter of law to determine what a state's legal obligations are, to be binding those legal obligations must be able to withstand the rigor of a consistent and uniform application. In that this will constitute specific statutory authorization for state law and international law in foreign policy. To create state legislature that is ill-suited to direct pre-established and defined legal obligations however diminishes the legal credibility of the foreign policy. Again, this is illustrated in the exacerbation of the conflict.

Norm expansion is also evident inasmuch as the principle of human rights was recognised alongside the principle of genocide for legal application, although, as stated above, initially outside the basic international framework. Moreover new legal standards associated with humanitarian interventions and complicity may have been established in

¹⁰⁹⁰ Thesis 270.

¹⁰⁹¹ Thesis 303, 308.

French domestic law concerning state obligations at the international level. Likewise, the United Nations was also quick to acknowledge the human rights situation as it could not ignore the possibility of another genocide occurring in Africa, illustrated in Security Council Resolutions 1479 and 1528.¹⁰⁹² The International Red Cross also responded to the human rights violations and informed parties to the conflict to comply with the rules of the international humanitarian law.¹⁰⁹³

However, although France and the international community recognised the issue of genocide and as such inferred standards as to when use of force during humanitarian catastrophes applies - the question of how it applies was not addressed. What is more, it was not addressed in either the Danish Institute Report or the Responsibility to Protect both of which preceded the conflict in Côte d'Ivoire. This is an ongoing problem the study identifies in chapter seven and one which the study makes reference to throughout the thesis.

Whether the effectiveness of international law hindered or promoted the decision-makers perception of security is complicated given the inconsistency in legislature and thus foreign policy. Although humanitarian concerns created an agenda of reference for France's decision-makers, domestic law itself posed a problem. The problem was situated in the legitimate expectation of Gbagbo for France to protect Côte d'Ivoire from an external invasion which conflicted with the

¹⁰⁹² Thesis:313.

¹⁰⁹³ Thesis:311.

existence of Chirac's strategy of non-intervention and on the basis that the conflict came from within Côte d'Ivoire.¹⁰⁹⁴ In the early stages foreign policy was unable to translate for interpretive purposes the relevance of the international legal principles into practice. Thereafter France's perception changed as it saw its position in Côte d'Ivoire as one of necessity since the alternative would be considered neglect, as well as a threat to national security concerning French citizens.¹⁰⁹⁵

Like Somalia, human rights a fundamental Constitutional principle, was represented as a threat to international peace and security. Relevant state legal obligations and principles of international law clarified where humanitarian intervention and its interests interacted in the formation of foreign policy. Consequently while French law included international legal principles and standards applicable to Africa, the applicable laws, a function of domestic legislation, and although ambiguous in character, were state-specific. This follows the logic behind the Danish Institute Report in its acknowledgment that states may need more than humanitarian motives to intervene as noted in chapter seven.¹⁰⁹⁶

As in the previous case studies, two possible rationales for intervention can be interpreted when analysing the causal factors. However, unique to the case of Côte d'Ivoire the rationales put forth are *conflicting* in nature due to France's domestic legal structure. First, the implications of

¹⁰⁹⁴ Thesis:313.

¹⁰⁹⁵ Thesis:314.

¹⁰⁹⁶ Thesis:179.

Rwanda and the fear of a possible repeat of genocide in Côte d'Ivoire and second, the civil war constituted a threat to France's national security.

In light of the fact that an objective of this thesis is to determine the importance of interpretation and its ability to justify or affect legal change, particularly when there is a need to integrate different legal norms and policy within a state's existing legal framework, it is appropriate to consider these two rationales given that they substantiate this contention. Moreover, while both rationales demonstrate the recognition of international legal rules, they also make clear that the interpretations of these norms within the domestic legal process can be conflicting because different interests may be inconsistent with another.¹⁰⁹⁷

The implications of Rwanda and the fear of a possible repeat of genocide in Côte d'Ivoire – observations from the case of Maurice Papon.

Until recently the issue of state responsibility for genocide had been unaddressed in the study of international law and foreign policy analysis.¹⁰⁹⁸ Since the Nuremberg Trials and the passing of the Genocide Convention in 1948, the potential criminal responsibility of *individuals* for acts of genocide has been generally recognised.¹⁰⁹⁹ The allegations and documented reports associated with France's role in the Rwandan genocide have not gone unrecognised in France. Responsibility connected to state action concerning genocide and the

¹⁰⁹⁷ Thesis:33.

¹⁰⁹⁸ *Public Prosecutor v. Papon*, Trial judgment, Assize Court of Gironde (April 2, 1998 [online]).

¹⁰⁹⁹ Ibid..

failure to intervene has been noted in the Elysée.¹¹⁰⁰ The allegations against France are also fashioned with future legal action, including the indictment of French officials and a possible legal “suit brought against France by Rwanda at the International Court of Justice (ICJ), which handles disputes between states.”¹¹⁰¹

Understanding the limitations and potential precedent of the Rwandan case in future legal matters against states for genocide, and for purposes of this study the implications it may have on Côte d'Ivoire when establishing humanitarian concerns within foreign policy. The implications of which will be indicative of the state's legal behaviour to affect and/or justify legal change, and a determining factor in how domestic law shapes foreign policy toward international law to effect humanitarian concerns.

Bearing in mind, that the politics of xenophobia in Côte d'Ivoire were proliferated by the government, and the experience of Rwanda, France chose to intervene in Côte d'Ivoire. As cited previously, initially France sent troops to protect citizens of Côte d'Ivoire and French nationals. This was followed by intervention in compliance with the 1961 bilateral cooperation agreement and the 1970 defence pact to monitor the ceasefire. Following recorded incidents of widespread violations of

¹¹⁰⁰ 1999 Report of the Independent Inquiry [online].

¹¹⁰¹ Paul Schmidt 'The future of genocide suits at the International Court of Justice: France's role in Rwanda' (2009) *Georgetown Journal of International Law*, Vol. 40 Nbr. 2.. In 'International Jus Cogens in the Law of State Responsibility (2006) 1 No. 1 *European Journal of International Law* 42-65) Gilbert Guillaume addresses the issues of French law on the Armenian genocide and its implications for future state responsibility concerning genocide.

human rights, substantiated by various human rights agencies and the United Nations' request to comply with the rules of international humanitarian law, France intervened to prevent, what it interpreted as further attempts of genocide. To not intervene in the civil war in Côte d'Ivoire would have found France complicit, as was the case in Rwanda.¹¹⁰² Particularly since the United Nations had recognised the violations of human rights as well as the continued violence and instability, and ruled both a threat to international peace and security. Consequently, humanitarian intervention was based upon France's interpretation of human rights abuses within the domestic context.¹¹⁰³

France's involvement can be further viewed in connection to French leadership in francophone Africa, which is situated in its legal and foreign policy traditions. This is evident given that France, and the international community, recognised that the mass killings and mass graves in Côte d'Ivoire represented the possibility of genocide when coupled with the xenophobic behaviour.¹¹⁰⁴ In its acknowledgment of genocide under municipal laws of individual jurisdictions, and as statutorily prescribed in French law regarding crimes against humanity, France enacted and implemented the international rules associated with genocide into its domestic law.¹¹⁰⁵

¹¹⁰² 1999 Report of the Independent Inquiry [online]; and Le Rapport de la Mission d'information parlementaire sur le Rwanda [online].

¹¹⁰³ Thesis:317.

¹¹⁰⁴ Thesis:310-11.

¹¹⁰⁵ Code Pénal; Livre II, Des crimes et délits contre les personnes; Titre Ier - Des crimes contre l'humanité, Chapitre Ier - Du génocide, Article 211-1 (French law defines "a group determined by any arbitrary criteria" which is far broader than that found in the Convention on the Prevention and Punishment of the Crime of Genocide.

When interpreting the definition of genocide France recognised as did the United Nations, not that the killings had been committed on a systematic basis, Article 7 (1), but that the killings were one of a number of acts. Violent acts which included torture and rape, and that these acts together were committed on a widespread and systematic basis, which were substantiated by various human rights agencies.¹¹⁰⁶ In France, the enactment of the rules of genocide into its domestic framework, affirmed the identification of the international human rights principle, and based upon its legal structure situated the rules in its foreign policy.¹¹⁰⁷ This reiterates the fact that an international principle must meet the criteria of effective legality from within a state's legal structure to be applicable.¹¹⁰⁸ In doing so, France identified how a particular rule of international law is recognised within its legal structure.

If we consider the complexities associated with the genocide in Rwanda, as it concerned France, and the particulars determined in the case of Maurice Papon,¹¹⁰⁹ reasonable interpretation of the rules of international law and established French law will link France to responsibilities associated with its former colonies as outlined in the French Constitution. As discussed previously, non-involvement on France's

¹¹⁰⁶ Thesis:307.

¹¹⁰⁷ *EC, ESA, October 20, 1989, Nicolo, n° 108243*, §Le droit international et le droit communautaire. Le droit international et le droit communautaire ont une valeur supérieure à celle des actes administratifs (the supériorité of the international treaties on the laws [domestic] is recognised without any restriction).

¹¹⁰⁸ Thesis:34, 59-60.

¹¹⁰⁹ Maurice Papon was the first Frenchman belonging to the Vichy government to be brought before the French Court and accused of complicity for crimes against humanity. In the court's words, "there exists a continuous network of authority and responsibility" *Papon* 1998:15.

behalf pursuant to its African sphere of influence would imply complicity in violation of the Genocide Convention. This is especially true if one considers that the crime of genocide in domestic law and the domestic prosecution of persons committing genocide are subjects of both state and international significance. Correspondingly, the failure of France to have enacted the laws against genocide domestically would have suggested acceptance and therefore contradiction with an international rule, which acts in tandem with recognised French legislature, particularly as its domestic law is comprised of international law.¹¹¹⁰

This expectation and the formulation proposed herein make sense when applying the principles of the court decision in *Papon* together with the merits to the case of France in Rwanda in 1994. *Papon* also establishes legal precedent in French domestic law concerning legal standards associated with humanitarian interventions and complicity. Furthermore *Papon* and the special cooperation laws that provide France with jurisdiction on offenses falling within the competence of genocide establish benchmarks of accountability.¹¹¹¹ They also produce direction for legal change, essential for legislature and policy, which may be construed as outdated and therefore lacking relevance to the situation at issue. Accordingly, although the rules of France's legal structure were forced to change regarding crimes against humanity, its foreign policy obeyed domestic rules as statutorily prescribed in French law, acting as a

¹¹¹⁰ Thesis:62.

¹¹¹¹ *Papon* 1998:15.

framework to regulate state behaviour, which is in accordance with the findings of this thesis.¹¹¹² It is how we understand the sources and processes of the strategic use of interpretation and legal reasoning for policy purposes.

Notably, in March 1994 and following the establishment of the International Criminal Tribunal for Rwanda (ICTR),¹¹¹³ the French parliament adopted special cooperation laws that provide for French jurisdiction over all offenses falling within the competence of genocide tribunals if the perpetrators are found in France, this includes French citizens and nationals.

The civil war constituted a threat to France's national security

In contradiction to the above and based upon French decision-makers' perception of security issues another rationale can be interpreted – that the civil war in Côte d'Ivoire constituted a threat to France's national security in November 2004. When it became evident that Côte d'Ivoire was becoming a humanitarian situation France intervened with the deployment of troops in an attempt to rescue French nationals and citizens from the Ivoirian territory.¹¹¹⁴ The intervention was based on French security strategy and legislative intervention policy rationale, which as stated previously, emphasizes humanitarian missions together

¹¹¹² This also confirms Dworkin's approach regarding the importance of status of legal sources in both domestic and international law and Tomushat's assertions that states utilize international law's dependency to politically construct international law within foreign policy (chapter one); as well as Raz, who argues that interpretation provides legal rules with certainty and predictability (chapters one and five.).

¹¹¹³ <http://unictr.unmict.org/en/tribunal>.

¹¹¹⁴ Thesis:329.

with requirements for territorial defence and maintaining defence agreements.¹¹¹⁵

In this case domestic law usurped international law given that the French deployment effectively underscored the division of Côte d'Ivoire into two parts as armed conflict ensued throughout. Thereafter, France found that it was in a position of defence resulting from issues that France found unable to control. As a result, despite its extensive engagement in Côte d'Ivoire, use of military force was initiated. “The rules of engagement were clear and unambiguous, to protect the civilian population and prevent an escalation of the conflict.”¹¹¹⁶ French forces also acted in self-defence for civilian protection as well as their own protection, which was in accordance with international law as well as French constitutional legislation (domestic law).¹¹¹⁷

From 22 September [2002], French military reinforcements were deployed in order to ensure the safety of foreign nationals, under the principle of international law which allows a state to protect its own nationals abroad ... designated Opération Licorne.¹¹¹⁸

Therefore, contrary to rationale established previously (the implications of Rwanda and the fear of a possible repeat of genocide in Côte d'Ivoire), it could be argued that the violence against France had more to do with

¹¹¹⁵ Thesis:314-15.

¹¹¹⁶ Gberie and Addo 2004.

¹¹¹⁷ See also *EC, ESA, May 30, 1952, Dame Kirkwood, n° 16690, Recueil Lebon p. 291*. It is specified that the administration cannot, in a general way, allow internal legal order to follow an illegal lawful act, i.e., in particular, opposition with the international law or the Community legislation (*EC, ESA, February 3, 1989, Co Alitalia, n° 74052*). “However, taking into account and in particular owing to the fact that the reversal in domestic rights the directives revêt from now on the character of a constitutional obligation”, *Co Alitalia*. In hindsight from Rwanda, it is unusual that the advice of legal council would not be sought given the particulars of the French Constitution (Marchal 2009, 2013; Bagayoko-Penone 2009; Touati 2009).

¹¹¹⁸ S/RES/1528 2004.

the ineffectiveness of its intervention than it had to do with France's commitment to the intervention. This is clearly reflected by France's inability to deal with its own legal status concerning the broken ceasefires. It is also evidenced in France's failure to provide a viable strategy to reduce the armed conflict and level of humanitarian suffering within a former colony. A colony accustomed to reliance upon France as a safeguard, despite *françafrique*/francophone status.¹¹¹⁹

Paradoxically, the few developments achieved under French diplomatic pressures, like the Linas-Marcoussis Agreement wherein Gbagbo felt he had been compromised, seemed to strengthen the rebellion and increase anti-French rhetoric. Arguably France engaged in diplomatic pressures in order to prevent military escalation and violations of human rights, but the inconsistency in established French legislature and policy indicates France's unwillingness to abide by the defence agreement as recognised and which Gbagbo interpreted as a non-implementation.¹¹²⁰

Also, during the course of *Opération Licorne*, French policy appears to have changed in that France maintained a position of neutrality both during diplomatic proceedings and use of force deployment. It seems that in an effort to establish a new paradigm to suit its non-intervention policy towards Africa, France failed to negotiate its bilateral agreements, which held full legal standing to meet the changing internal environment.

¹¹¹⁹ For France there is more at stake than the safety of French citizens and economic interests in its former colony. France has long relied on its role as a supporter of developing countries to distinguish itself in world affairs. (Paris, 2009).

¹¹²⁰ Thesis:309, 310.

This was no doubt further exacerbated by the development of RECAMP, to prevent France's army from being implicated in intricate civil and ethnic wars following problems associated with Rwanda. This new strategy provided a dual policy problem because RECAMP created an imbalance given France's prior long-standing unilateral policies while at the same time attempting to incorporate multilateral policies, both based in domestic law.

Although humanitarian concerns may have created an agenda of reference for policy makers, France's security perceptions stemmed from domestic security concerns and legislative requirements. In an attempt to deviate from traditional alliance politics and legal agreements, France found itself in a perpetual power struggle in its former colony based upon intervention policy rationale, and driven by traditional sources of international and French law and the principle of self-defence. Consequently, in this rationale, although legal interpretation is situated in human rights protection and threats against French nationals, the power struggle appears to undermine the effectiveness of international law in foreign policy.

Humanitarian Intervention as a Legal Instrument of Foreign Policy

In this case, as in Rwanda, the recognition of humanitarian intervention as a legitimate practice and therefore its legal status is part of the French decision-making process. Hence, interaction between state and international law in this way is common place and clearly recognised

within France's legal structure. This confirms the traditional method of interpretation of international law in French policy, which is recognised by the authorization of France's statutory requirements. In essence however the situation in Côte d'Ivoire led to different interpretations and applications of the humanitarian concerns at the domestic level due to France's inability to abrogate its old rules concerning protection of its *pré carré* and intervention with its new rules of non-intervention. This is witnessed in the French government's hesitation to commit to the protection of Côte d'Ivoire despite its legal obligation as established in pre-existing alignment agreements.¹¹²¹

Furthermore the international principle of human rights may have been positioned within the domestic legal framework but its representation relevant to the Côte d'Ivoire crisis was not initially interpreted to protect fundamental human rights in foreign policy decisions. Instead France's foreign policy objective was to secure peace between two warring parties. If you consider that the intervention policy during the early part of the civil war was not constructed based upon legal principles of international law¹¹²² (human rights and use of force) but was instead determined by indecisiveness in interpretation of the cooperation and defence agreements at issue, humanitarian intervention may not have interacted with the decision-making process at all. Nevertheless France's foreign policy did support the United Nations on use of force

¹¹²¹ Thesis:309-10.

¹¹²² Thesis:311.

and attention to human rights and was therefore legitimately applied in its foreign policy decisions.

Moreover analysis of the *conflicting* rationales for intervention indicate that France's legal sources of law had a central influence on the course of action taken in the overall similarity of the intervention decisions. Consequently while both rationales created an agenda of reference for policy makers (the fear of a possible repeat of genocide in Côte d'Ivoire and/or the civil war constituted a threat to France's national security) the rules of international law (human rights, the use of force) remained the same. The underlying difference was, of course, how the rule met the criteria of effective legality¹¹²³ from within France's domestic institution and how it was interpreted to create legal-political authority.

In the first rationale France's interpretation of human rights abuses is complicated by the rules of complicity and the norm of genocide. This was advanced in that the United Nations had recognised the violations of human rights as well as the continued violence and instability and ruled both a threat to international peace and security.¹¹²⁴ The rules of complicity and the norm of genocide were further considered in *Papon* and the special cooperation laws that provide France with jurisdiction on offenses falling within the interpretation of genocide. As this thesis points out, expanding the scope of both international and state law and therefore its interpretation within the domestic legal framework justifies

¹¹²³ Thesis:34.

¹¹²⁴ Thesis:314, 317.

legal change and provides a clear development for legislature and policy that may be considered outdated and no longer relevant.¹¹²⁵ In this sense clarification of the relationship between France's foreign policy and international law is witnessed in the allocation of power in the decision-making process to interpret and execute the principles of international law.

The second rationale offers no complications because it is perceived as a threat to France's national security evidenced by increasing human rights abuses and threats against French nationals. France intervened in an attempt to rescue French nationals and citizens based upon French security strategy and intervention policy rationale which, as previously discussed, emphasizes humanitarian missions together with requirements for territorial defence and maintaining defence agreements.¹¹²⁶

Thus in this case, and in accordance with neoclassical realism, the actions of France in the international system can be explained by the legal power dichotomy facing its decision-makers, determined by the bilateral defence and cooperation agreements at issue and human rights protection. This also affirms chapter three in that the conduct of states will differ from the expectations of the international system due to limitations inherent to any state's legal institution and which cannot be overcome at the international level.

¹¹²⁵ Thesis:50.

¹¹²⁶ Thesis:309.

Summary

The conflicts in Rwanda and Côte d'Ivoire illustrate the inherent problems in France between the principles associated with human rights and its ties to Africa as identified in chapters two and six. France maintained an interventionist foreign policy in francophone Africa until the 1990s and both Africa and humanitarian intervention are incorporated into the French Constitution.¹¹²⁷ As such France considered foreign policy rationale on Rwanda and Côte d'Ivoire a domestic concern based on established legal policy and responsibilities.¹¹²⁸

Accordingly France's decision-making process is shaped by its legal framework, sustained by Constitutional implementation, Civil Code, and bilateral cooperation and defence agreements; as well as extensive shared historical backgrounds, economic and political ties.¹¹²⁹ This presented a legal conflict for France between human rights and its ties to Africa. Since this legal conflict was situated at the domestic level both conflicts arrived at different interpretations of the same principle of international law. This is consistent with the underlying problem identified in this thesis which is not whether a rule of international law is legally binding but rather how states translate into practice a rule of international law that claims the protection of human rights and permits the use of military force for that protection.¹¹³⁰

¹¹²⁷ Thesis:269-70, 337.

¹¹²⁸ Thesis:267, 302.

¹¹²⁹ Thesis:66, 269-70, 337.

¹¹³⁰ Thesis:4.

In Rwanda France interpreted human rights protection with the Habyarimana regime to protect its sphere of influence.¹¹³¹ In doing so, the recognition and application of law coloured the obligations of France to Rwanda and the rights of civilians in the armed conflict. Contrary to the Rwanda approach, France's initial position in Côte d'Ivoire was one of non-intervention but this position was contrary to its legal obligations as cited in the bi-lateral cooperation agreements and defence pact.¹¹³² France later interpreted human rights protection to include the fear of a possible repeat of genocide similar to Rwanda, the stability of a previous French colony and the protection of French nationals.¹¹³³

Underlying domestic factors also played a role in the varying degrees of implementation on the use of force with state strategies and the decision-makers. At the Executive level, Parliament had a larger role in Côte d'Ivoire than the role afforded it during Rwanda.¹¹³⁴ The United Nations and various interdepartmental agencies and NGOs were contributory factors in the Côte d'Ivoire intervention decisions and a later influence in Rwanda. In that the international organizations afforded each case an element of reference at the systemic level for identification within French domestic sources of law necessary for interpretation and legal reasoning for policy purposes.

¹¹³¹ Thesis:367, 302.

¹¹³² Thesis:303, 308.

¹¹³³ Thesis:313.

¹¹³⁴ Thesis:312.

The legal rationale behind the framing of policy decisions concerning both conflicts stems from the differences in information and the interpretation of the information provided, including use of humanitarian language or the absence thereof towards the conflict. This absence of language was clearly visible in Rwanda.¹¹³⁵ While making its case for intervention, France recognised the legal nature of the underlying international principles at issue but basically overlooked information due to French policy based on prior defence and cooperation agreements with Rwanda. In Rwanda the interaction between France's foreign policy and international law reveals that certain norms of international law (specifically genocide) may be both an instrument of legitimacy as well as an obstacle to its exercise in the course of decision-making.

The scope of the legal protections of human rights afforded by the French government is defined by statute, and its domestic law is comprised of international law. The French Constitution therefore ensures effective legislation of a basic principle of international law. In France this enactment procedure identifies issues consistently within the domestic framework on human rights concerns and allows for a legal standardization between effectiveness and the construction of foreign policy. French foreign policy therefore obeyed fixed legal rules regarding the course of action to be taken during the foreign policy process. Consequently, as determined by neoclassical realism (and established in chapters one, two and five) in France's interpretation of

¹¹³⁵ Thesis:231.

human rights protection, the direct effect of international law on state law allows for the principles of international law to rely on legislation for interpretation and implementation. Therefore, although states may agree that the principle of human rights exist the justifications and obligations under this principle are translated differently and will affect the protection of civilians, which is in accordance with the findings of this thesis.

To conclude this section, a comparative approach is applied to the causal factors that influence foreign policy in the United States and France to evaluate the variances between each state's decision-makers in light of the empirical evidence provided. The comparative research determines whether states interpret international law differently to create legal-political authority, even when facing the same systemic pressures.

12. The Comparative Analysis of France and the United States

Do states arrive at different interpretations of international law to create legal authority concerning humanitarian intervention? How can states agree that a particular international legal rule exists, but then understand the rights or obligations imposed by that rule in different ways? To respond to these questions, the foreign policy decisions of France and the United States, in four regional conflicts - the Liberian civil war (1989), Operation Restore Hope (1992, Somalia), Opération Turquoise (1994, Rwanda), and the ongoing conflict in Côte d'Ivoire (2002-current) have been analysed. The research has assessed the degree to which the interpretation of international law at the domestic level affects how states act in shaping the structure of authority and legitimacy underlying a principled approach to humanitarian concerns.

This comparative analysis revisits the foreign policy decisions of France and the United States to clarify the extent to which, in the context of the African interventions, international law was interpreted within the domestic legal framework to justify or affect legal change, if any. As stated earlier, this allows for an original perspective which helps to inform and develop an understanding of how state and international law interact simultaneously to effect humanitarian concerns within the decision-making process. To do this, a comparative approach was applied to the causal factors proposed as affecting the influence of the principles of international law on the policy process of each conflict: 1)

the decision-makers' arguments for foreign policy reasoning; 2) the domestic legal framework, which includes legal tradition and sources of law; and 3) the actions of the United Nations. For purposes of this chapter, the underlying influence of the United Nations will be discussed before the legal framework.

In comparative analysis of both states' legal-political and strategic reasoning in the formulation of foreign policy, France emerged from the Cold War with a well-established mechanism for intervention decision-making in Africa, along with a foreign policy process that had regular practices characterised by presidential exclusivity and interventionism. In contrast, the status of humanitarian intervention in the United States was in a state of development within the domestic process. There were no formal policy guidelines for intervention in place at the time. Decisions to intervene by the United States were idiosyncratic and situation specific, and often diminished by ad hoc pluralism.

This decision behaviour was evident in both Liberia and Somalia. A basic position of non-interference was the guiding principle for United States' foreign policy initially because neither conflict was considered relevant to the United States' national interests.¹¹³⁶ When force was used in Somalia the United States did not claim military intervention based on threats to its security but cited human rights, a principle of international law.¹¹³⁷ In contrast, the French executive's foreign policy centred on

¹¹³⁶ Thesis: 8:237, 238-243, 242; 9:257, 176, 261. (Denotes chapter and page number).

¹¹³⁷ Thesis: 9:260-262, 265.

intervention and security concerns and both played an important role in policy rationale.¹¹³⁸

In Rwanda, French intervention was based on France's relationship in its official capacity (*pré-carré*) as well as personally.¹¹³⁹ When intervention was required France's foreign policy was based on perceptions of an external threat shaped by the bilateral cooperation and defence agreements between the two countries so to affect intervention according to its own interests; despite the international framework afforded within the French Constitution.¹¹⁴⁰ Côte d'Ivoire, much like Somalia, was disregarded initially.¹¹⁴¹ As the situation became increasingly problematic, intervention was necessitated by concerns of the possibility of genocide and followed by attacks on French citizens which were considered a threat to national security. Moreover, to not intervene would have been considered a policy of neglect by France.¹¹⁴²

In both France and the United States, the president is the ultimate decision-maker and the office of the president is the key source of intervention policymaking. The presidency is highly institutionalized in the United States yet Congress has a large influence as observed in both U.S. cases. In this context, it is easy to account for non-intervention in Liberia as there was a lack of high-level concern among the top leadership in the Bush Administration to focus on the humanitarian

¹¹³⁸ Thesis: 10:294-98; 11:318-19, 323, 326.

¹¹³⁹ Thesis: 10:286-87, 300.

¹¹⁴⁰ Thesis: 10:304-05, 308-09.

¹¹⁴¹ Thesis: 11:320-01, 325-26.

¹¹⁴² Thesis: 11:328, 331, 340, 348.

issues. Despite the significance of the historical ties with Liberia, the Bush administration was reluctant to use military force.¹¹⁴³ Somalia on the other hand was on Bush's desk early in the crisis,¹¹⁴⁴ and Bush encouraged staff to examine additional diplomatic efforts to enhance the United Nations efforts in Somalia.¹¹⁴⁵

By contrast, in France although constitutionally it is the president who has the final word on intervention and defence issues, it is the prime minister who nominates the ministers in charge of implementing foreign policy decisions. With regard to Rwanda however Mitterrand made all the intervention decisions.¹¹⁴⁶ Despite information received from interdepartmental agencies and opposition from Prime Minister Balladur to his intervention policies, Mitterrand bypassed parliamentary procedure regarding all decision-making. This included decisions regarding the Rwandan Opération Turquoise.¹¹⁴⁷ Rwanda should also have necessitated a level of neutrality on France's behalf but instead, the legal tension between humanitarian intervention and sovereignty created political problems for France's policy-makers and operational dilemmas on the ground for its military.¹¹⁴⁸ A tension which underscores the theme of this thesis as set out in section three.

In Côte d'Ivoire, although Chirac took the direct lead, decision-making was developed by the top policymakers within the Executive and

¹¹⁴³ Thesis: 8:234, 237.

¹¹⁴⁴ Thesis: 9:257.

¹¹⁴⁵ Thesis: 9:258-59.

¹¹⁴⁶ Thesis: 10:237-238.

¹¹⁴⁷ Thesis: 10:242-244.

¹¹⁴⁸ Thesis: 10:235, 242-243.

Parliament, which included Prime Minister de Villepin.¹¹⁴⁹ As such, concerns over intervention were put before the Constitutional Council as part of the decision-making process. Even though France, during Chirac's presidency, maintained a non-intervention policy in Africa, de Villepin's decisions centred on the authorization and legality of enforcement of the 1961 cooperation agreement and detailed rules of engagement regarding decisions to use force.¹¹⁵⁰ This had the effect of substantiating France's established domestic position in Côte d'Ivoire, and Rwanda respectively.

The United Nations also had an underlying influence on the effectiveness of international law in the decision-making process. The research gathered on the United Nations concerning the four conflicts is mixed. It is clear that the peacekeeping missions in Somalia and Rwanda overshadowed the peacekeeping success in Côte d'Ivoire. The United Nations' position in the international community should have demanded impartiality yet the research shows there was clearly a lack of impartiality concerning Rwanda. This is notably in that Rwanda had a seat on the Security Council while the genocide was occurring.¹¹⁵¹ As the voice of impartiality and the central instrument through which international action is taken to prevent or mitigate gross violations of human rights, the United Nations Security Council's standing on this would seem to have had the adverse effect.¹¹⁵² Although this draws

¹¹⁴⁹ Thesis: 11:312-13.

¹¹⁵⁰ Thesis: 11:314-315, 331.

¹¹⁵¹ Thesis: 10:287.

¹¹⁵² Thesis: 10:282.

attention to the existence of a rule of international law, it also highlights the inherent conflicts regarding the rights or obligations of states concerning human rights and the interpretation of those rights from within a state's legal framework. A factor established in chapter four, given that the United Nations Charter itself highlights the confusion between sovereignty and peace and security from within the international legal framework.

The implementation of United Nations Chapter 7 rulings in Somalia and Côte d'Ivoire signified that violations of human rights (incorporated with violence and instability) constituted a threat to international peace and security and in these instances superseded state sovereignty, thus securing a legal balance between sovereignty and permissible means of intervention to ensure peace and security. To secure this balance, the relationship used to govern legal behaviour between international law and foreign policy required interpretation of the rules of international law within both France's and the United States' domestic legal structures for effectiveness.

Analysis of the domestic legal framework of both France and the United States illustrate adherence to the rules of international law. Notably that the effectiveness of international law is a result of interpretation and application as prescribed within the state's domestic legal framework.¹¹⁵³ As the empirical evidence shows, both states develop their legal interpretations through individual state norms and by means of the

¹¹⁵³ Thesis: 8:225, 226-27; 9:249-50, 251-52; 10:286-87, 289; 11:317, 319-20.

political bodies which apply those norms. Although both states legal systems have similar principles, the main difference is in application (methodology) and the way in which legal standards are established, grounded in the differences between their normative legal structures. As set out in chapter one, the United States tradition is founded on common law which is based on precedent. It is developed by court decisions, legislation, and texts. Because of this, legal sources in the United States are always subject to legal interpretation.

By contrast, France is a civil law state, its legal decisions are based on written text (the Civil Code), which the courts are obliged to uphold not interpret. Sources of law may only be changed or modified through amendment by Parliament, although the actual content of the laws can vary among civil law, just as it can in common law. For instance, France's attempt to change its unilateral policies toward Africa proved controversial compared to the United States' interpretation of human rights in Somalia.¹¹⁵⁴

In both France and the United States this produced a justification mechanism for legal change in both the legal framework and domestic policy, including change at the international level. As a result, in two of these instances interpretation allowed for 'essential change within a broader framework of continuity'.¹¹⁵⁵

¹¹⁵⁴ Chapters nine and eleven.

¹¹⁵⁵ Chapter one.

Thus as hypothesised, each state's domestic legal behaviour established the way decision-makers interpreted international law concerning interaction with foreign policy as regards the interventions in the four conflicts in two ways. First, each state's legal tradition represented how the decision-maker perceived and interpreted the principles of international law (human rights and use of force) at the domestic level; what that principle was intended to achieve; and how the state's legal framework and sources of law could be used to meet the required foreign policy needs for the respective humanitarian crisis. As with any general understanding of law, legal structures shaped the decision-making process by clarifying what constituted legitimate action from within the states' established legal sources and its normative system of rules. As evidenced in both France and the United States, the domestic decision making environment acts as a filter to mediate the tension between the international system and foreign policy.¹¹⁵⁶ In that the intervening variables at the domestic level had the effect of strengthening and/or weakening the influence of systemic factors (of the international system), as explained by the thesis legal and theoretical framework.¹¹⁵⁷

Second, not only did state legal behaviour and its sources shape foreign policy toward international law but interpretation also affected state obligations. This was particularly demonstrated in France on issues associated with its bilateral cooperation and defence agreements versus

¹¹⁵⁶ Thesis: 9:224-255, 260; 10:249, 258-59, 10:286, 288, 296; 11:317, 320-21.

¹¹⁵⁷ Sections one and two.

documentation on genocide and national security.¹¹⁵⁸ It was also evidenced in the United States on its non-intervention decisions in Liberia and Rwanda.¹¹⁵⁹ As previously discussed in chapter one, while it can be assumed that the content of the rules of international law is the same (human rights and use of force), the underlying difference was whether the rule met the criteria of legality effective in the relevant jurisdiction; and how that criterion was interpreted during the formulation of foreign policy.

The empirical evidence illustrates that decision-makers in both the United States and France base their decisions on internal legal resources and relative sources of law that individual decision-makers will unquestionably understand as correct and valid. Legal traditions are also reflected in the tasks of the political branches in the interpretation and application of international law as witnessed relating to the perceptions of decision-makers and the relevance of the role of the state to the conflict in question. It can therefore be said that states interpret international law differently relating to decisions to use force or to intervene or not to intervene in foreign policy.

In France, as hypothesised, the effectiveness of international law resulted from its conservative approach and France utilized a traditional interpretation of existing international law in both Rwanda and Côte d'Ivoire. As the cases illustrate, interpretation was initially applied as a

¹¹⁵⁸ Thesis; 10:186, 267, 272; 11:291, 302, 311.

¹¹⁵⁹ Thesis: 8:1226-30; 9:248-49.

result of existing bilateral cooperation and defence agreements between France and its francophone state.

Surprisingly in the United States where the thesis expected a more liberal interpretation, the United States did not move forward with an interpretation of the human rights principle in Liberia as its traditional manner would suggest. Whereas intervention in Somalia moved beyond national security interests with the suggestion of humanitarian intervention as an element of post-Cold war foreign policy. Furthermore the intervention in Somalia is unique because there was no sovereign authority within Somalia to oppose intervention and the United States had no direct economic or strategic interests within Somalia. The fact that the United States withdrew troops only partially takes away from an unexpected change in non-intervention policy.

As observed in chapters ten and eleven, international law is a recognised part of French law and because of this is considered a binding source of law in the same way the constitution or civil codes are considered binding. This creates a strong relationship between understandings about domestic law and the purpose of international law, and affords international legal principles a place in the French legal system. Therefore the interpretation of an international legal rule is regulated by law. This same regulation also determines the legal interpretation of the cooperation and defence agreements at issue in both Rwanda and Côte d'Ivoire. Therefore, international law aided in the regulation of foreign

policy regarding use of force as mandated by the United Nations in Rwanda, but at the same time intervention was construed as part of French foreign policy. The same is true in Côte d'Ivoire and the later use of force decisions when read together with Security Council Resolution 1464.¹¹⁶⁰

Similarly, however, in France new meanings or interpretations of international law may have been suppressed by the legal-political decision-making process located within the legislative branch. Such was the case between Mitterrand and Balladur and their disagreements over Constitutional positioning and the existing formal bilateral military agreements in Rwanda.¹¹⁶¹ This was also visible regarding complicity and non-involvement on France's behalf pursuant to its African sphere of influence on the question of genocide in Côte d'Ivoire. The failure of France to have enacted laws against genocide domestically would have suggested acceptance of the genocide in question, and would be in contradiction to an established international rule; rules which act in tandem with recognised French legislature. Particularly as France's domestic law is comprised of international law.¹¹⁶²

In the United States the application of international law depends upon a decision by the domestic legal system and the scope of the legal protections of human rights afforded by the U.S. government as defined by case law. This addresses the necessary issues of procedure and legal

¹¹⁶⁰ Thesis: 11: 307, 317.

¹¹⁶¹ Thesis: 10:249, 252.

¹¹⁶² Thesis: 2:43-44, 6:107, chapters 10 and 11

substance. In this manner, the domestic legal framework links authority and effectiveness in its consideration of legal principles of international law, particularly when there is a need to integrate different legal norms and policy within an existing legal framework. Within the United States' government the debate about what may or may not be an emerging rule of law is held in two forums: the United States Congress who may enumerate these rights and the Supreme Court who may articulate rights not recognised and thus afford the rights direct effect and legal obligation under state practice. However as evidenced in Liberia it is often clear that direct effect alone is not enough because international rules, even if they succeed in entering into the United States legal system, are still subject to possible restrictions.¹¹⁶³

During the Liberia conflict there was no established case law to justify intervention for humanitarian reasons. The particulars of Liberia correspond to an assertion addressed in section three, there were no formal legal guidelines or legal mechanisms at the state level associated with defining the principles (both domestic and international) that comprised humanitarian intervention.¹¹⁶⁴ The contradictory nature of humanitarian intervention made it difficult to determine not so much which international rules to apply, but how the rules apply, and how to best resolve the complex relationship between the international legal principles at issue and domestic law. In the cases particular to the United States the principles of humanitarian concerns were translated through

¹¹⁶³ Thesis: 8:241-41, 242.

¹¹⁶⁴ Thesis: 8:243-44, 248.

the US domestic legal system and decision-making process and became binding as a matter of domestic law.¹¹⁶⁵

Consequently, the domestic legal framework established the relationship between international law and foreign policy. Because many international rules, such as those pertaining to human rights, have their origins within a state's domestic structure, contextualisation of humanitarian intervention in foreign policy will carry the weight of domestic significance despite its obviously international focus. In this sense foreign policy will obey certain legal rules which act as a framework to regulate state behaviour, often predisposed by the interests of the international community.

It is also clear in light of the empirical evidence provided that differences *within* each of the legal and political institutions are as important as differences *between* each legal and political institution. The differences within each state involve legal and political institutional processes that interact simultaneously in foreign policy. Both of which are dependent upon sources of law associated with the capabilities of states to interpret the principles of international law, the perceptions of decision-makers and the relevance of the role of the state in the context of humanitarian intervention as understood within the state.

For France, the differences are articulated in domestic law (the French Constitution and Civil Code) and foreign policy that attempts to explain

¹¹⁶⁵ Thesis: 9:249-50.

from a legitimate standpoint the problems associated with its colonial history in Africa. This ties the development of national identities with certain cultural characteristics in francophone Africa and is viewed as part of a larger context relating to French leadership in francophone Africa. This leadership also led to internal debate within the French government. Mitterrand, Balladur, Chirac and Juppé each attempted to regulate their own foreign policy, with each following their individual personal and electoral agenda. Mitterrand in particular was given to informing policy decisions that were not agreed upon.¹¹⁶⁶

Moreover, as Mitterrand's decisions in Rwanda illustrated, what a decision-maker thinks about a situation often has more influence on foreign policy than what is actually happening. Since that opinion will define foreign policies regardless of whether or not the opinion is valid. This perception was also articulated in Bush's policy regarding non-intervention in Liberia and reaffirmed during the Clinton administration.¹¹⁶⁷ In the United States, post-Cold war Africa was perceived to be marginal regarding global security issues and geo-strategic interests. Bush pushed for intervention in Somalia in response to the increasing pressure to do something in Somalia and also in response to the political backlash on Bosnia. Clinton ended intervention in Somalia amid the decline of congressional support.¹¹⁶⁸

¹¹⁶⁶ Thesis: 10:280-82; 288.

¹¹⁶⁷ Thesis:8:184-85, 212

¹¹⁶⁸ Thesis: 9:248-49.

It goes without reason to conclude that intervention decisions based upon humanitarian concerns are tied to a state's willingness to intervene and how the state legally develops the case for intervention. For the United States (and France post Chirac) inasmuch as there was no consensus on reasons for action in humanitarian intervention, the focus was to construct binding, enforceable policy that provided legitimate authority to the ambiguities that created significant practical challenges to the responsibilities of humanitarian intervention. Ambiguities of which the United Nations Charter itself highlights. This corresponds to the Danish Institute Report, which assumes that the question of legitimacy is determined primarily based on moral or political considerations but also involves legal considerations which may have important political consequences.¹¹⁶⁹

France links authority in much the same way. In France the principles of international law are binding because they are recognised in domestic law and do not require re-evaluation in the policy process. Problematic in this institutional structure however was the existence of a Franco-African legal framework of cooperation which coincided with France's constitutional legal framework. This included existing formal bilateral agreements and informal security commitments. In addition, because Africa is incorporated into the French Constitution, Africa was an element of France's legal structure and provided legitimate authority (for France) to intervene based upon these legal obligations.

¹¹⁶⁹ Chapters one and seven.

The obligation underlying humanitarian intervention remains subjective and is therefore based upon the values the state associates with the rules of international law – the protection of human rights and the legitimate use of military force for that protection, in the context of this thesis. In both Rwanda and Côte d'Ivoire, France intervened with an emphasis on humanitarian missions together with requirements for territorial defence and maintaining defence agreements. French forces acted in the way they believed was in accordance with their mandate in international law as well as French law.

Rationale for the United States' intervention varies. In Liberia rationale was based upon non-intervention and was devoid of any security strategy or intervention policy rationale. In addition, foreign policy decisions compromised the human rights issues in its failure to incorporate the facts of the conflict with the human rights language. In Somalia, the United States moved beyond national security interests with the suggestion of humanitarian intervention as an element of post-Cold war foreign policy, citing human rights as justification for intervention. In Somalia there was a need to integrate international legal rules to construct policy within the United States' existing legal framework. This allowed the rules of international law to be adapted to an unforeseen situation within the domestic framework.¹¹⁷⁰ In doing so the policy allowed for norm expansion to meet the requirements necessary to effect humanitarian concerns.

¹¹⁷⁰ As explained in chapter one.

In concluding this chapter and as determined by neoclassical realism, the thesis' emphasis on the domestic level of analysis has explained the effectiveness of international law on foreign policy outcomes because each case study identified the relationship between international law and foreign policy through distinctive state domestic legal institutions. While the legal structures of each state had a central influence on legal behaviour subject to the rules of international law, resulting in different perspectives regarding the course of humanitarian action to be taken or not taken, the legal obligations afforded international law as interpreted through the state's domestic legal framework, regulated the interaction between each state and its position in the international system and consequently each state's foreign policy decisions.

As predicted, in allocating space to the interpretative process the thesis was able to analyse how humanitarian pressures were translated through different domestic state laws to regulate the interaction between the state and its position in the international system. In that the domestic legal framework positioned how the interpretative process was established and operated between humanitarian concerns and foreign policy by identifying the legal scope and/or limitations of the international principles at issue to effect humanitarian concerns.

Conclusion:

Events are not negotiable but their interpretation can generate debate. (author unknown)

While we would like to believe that society operates by morality, it does not – it operates by law. The moral justification of humanitarian intervention is not hard to find. However, to prove the intention of a situation it is necessary to consider, not: was it wrong? But: was it legal? And, how is that legality interpreted? Moreover, was it legal in established law or by the laws established at the time? BJM

Conclusion

Although written within the framework of twentieth century thought on legal study and human rights many aspects of humanitarian intervention currently remain litigious. The author found that the cases in this study of humanitarian intervention illustrate not only that differences in interpretation exist, but that the conceptualisation of international law at the domestic level is crucial to understanding a state's legal behaviour concerning humanitarian intervention. Although causal factors such as the United Nations may have influenced policy, the responses of both France and the United States to humanitarian concerns were in accordance with the parameters of their individual domestic legal structures at the time. This had the effect of limiting policy decisions on whether to intervene or not intervene for humanitarian reasons because legal structures both restrained and empowered each state.

While it can be argued that the interpretation of international principles is a reflection of state interests that lends legitimacy to intervention/non-intervention decisions, it will remain necessary for that international principle, together with state interest, to meet the criteria of effective legality from within the state. These legal parameters demonstrated in the adaption of neoclassical realism, with its emphasis on the domestic level of analysis illustrated that state power can no longer be limited to military factors. This was witnessed in the four cases in sub-Saharan Africa. Legal capability ran parallel to military capability. As a result, and as this author asserted, the domestic legal resources of a state are

important in the decision-making environment because legal institutions exert power. Therefore, the findings of this research challenge the traditional meaning of power and rule structures inherent in realist theory, which has traditionally measured power in terms of military capabilities.

While challenging the traditional approach of realism is itself a contribution to research. This thesis also adds value to the interdisciplinary dialogue between international legal study and comparative foreign policy analysis, and, in two ways, has informed the ongoing debate about how principles of international law are translated into practice when cases of humanitarian concerns arise. First, it has considered an approach that is capable of analysing the interpretation and application of international law at the domestic level during policy-making.

Second, it has generated a better understanding of the domestic process and mechanisms by which international law regulates the interaction between the state and its position in the international system. It has done this by drawing attention to different institutional processes (law and politics) that interact together in foreign policy and by illustrating how essential differences in a state's legal framework, its sources of law and strategic use of interpretation, affect how each state shapes the structure of authority and legitimacy in its foreign policy. This allowed the thesis to present an original perspective which informed and developed an

understanding of how state and international law interact simultaneously in foreign policy to effect humanitarian concerns. In particular, humanitarian concerns related to the contestation over the protection of human rights.

When this research began its aim was to identify how differences in the interpretation of international law at the domestic level affect how states act in shaping the structure of authority and legitimacy underlying a principled approach to humanitarian concerns. It also sought to determine how decision-makers understand the role and purpose of law and how this determines foreign policy decisions. Specifically when there was a need to integrate different legal norms and policy within a state's existing legal framework. This allowed the analytical focus to centre more on what international law *does* on a particular issue in foreign policy and less on what international law *is*. This established how international legal rules are actually used during the formation of foreign policy. Furthermore, the research wanted to explore how international and domestic law interacted by exploring the complex and sometimes contradictory nature of international legal principles and of a state's legal institutional responsibilities, when deliberating foreign policy concerning humanitarian intervention for the time period 1989-2002.

To answer these questions an interdisciplinary methodology was needed that was capable of identifying where humanitarian intervention and its

interests interacted with foreign policy formulation. Consequently the research located itself at the intersection of international legal study and foreign policy, using comparative foreign policy analysis and neoclassical realism in its theoretical approach. By setting out an explicit legal and theoretical foundation to underpin this research, a framework was created that posited the need to focus on the domestic decision-making environment between the international system and foreign policy, and then analyse how humanitarian pressures were translated through a state's legal structure and its decision-makers. This focus enabled the research to locate the importance of law in the domestic decision-making environment because legal institutions exert power. The domestic legal framework positioned how the interpretative process operated between humanitarian concerns and foreign policy. As explained in chapter one, the effect brought about by the domestic legal environment is therefore a key factor for determining intervention decisions. In practice this is observed in the strategic capabilities of legal behaviour involved in the interpretation and application of international law which controlled foreign policy outcomes in both France and the United States.

When conditioned with issues of legality associated with humanitarian intervention, the power of international law's effectiveness was clearly witnessed in the state's normative domestic use of familiar internal legal resources that the individual decision-makers unquestionably understood as correct and valid. The perception of the decision-makers addressed

two issues: information received at both the international and domestic level and which information received was relevant to the decision and which was not.

In both France and the United States it was necessary to first identify the principles represented by the humanitarian situation and then determine how those legal principles were to be translated into practice. This was based upon the fact that the legal authority of a state carries with it the authority to impose fixed legal rules, including those based upon the principles of human rights (section one).

In the United States, there was no existing law which defined humanitarian intervention and because of this it was necessary to extract specific constitutional rules to support its non-intervention decision in Liberia; while in Somalia the policy decision for the use of military force was coupled with the need to secure peace and security. The actions of France in the international system can be explained by the legal power dichotomy facing its decision-makers, determined by the bilateral defence and cooperation agreements at issue and human rights protection. Again, this is not to say that state interests did not play a role, but without interpretation of the applicable legal sources, as well as what each state deemed appropriate legal reasoning, foreign policy objectives – whether to intervene or not intervene - could not have been met. Therefore this gives confirmation to the fact that states develop their own legal interpretations through individual state norms and by

means of the legal-political bodies applying those norms to provide legal rules with certainty and predictability (chapters one and five). This satisfies the question of how we understand the importance of the application of sources of law and the strategic use of interpretation and legal reasoning for policy purposes regarding the course of action to be taken in conflict situations (security threats).

As determined by neoclassical realism, emphasis on the legal domestic level of analysis explained the effectiveness of international law on policy outcomes because it was able to identify the relationship between international law and foreign policy through distinctive state domestic legal institutions. These domestic institutions determined the extent to which international law imposes a legal duty upon states to use military force when necessary to prevent or stop human rights abuses and how the state uses that legal principle within foreign policy. In this way the state, by utilizing its domestic legal and political structures as a mechanism for constructing international authority, allows for structures of hierarchy absent in the international system. (This proposed function was discussed in chapters one, three, four and seven).

In advancing this methodological approach the research was able to address bias in contemporary foreign policy and legal literature (Introduction and chapter six), and it also contributes to the debate concerning power in the realist schools of international relations theory. Moreover the author anticipates that if this approach is taken seriously, a

new form of analysis will emerge from the thesis' empirical studies that will focus on how domestic legal institutions identify the legal scope and/or limitations when establishing international principles for humanitarian concerns within foreign policy through neoclassical realism. As a result, the strengths of this methodology are visible within this research and have proved essential in its empirical focus and findings.

Notably, comparative foreign policy analysis and neoclassical realism were able to theorise the differences in the effectiveness of international law in shaping the structure of authority (legality) and legitimacy within the French and the United States decision-making process when addressing the four cases of humanitarian intervention in Africa. Accordingly section four of this research demonstrated how the outcomes of the decision-making process, in large part, depends upon a state's interpretation of a principle of international law that involves the simultaneous application of the protection of human rights and permits the use of military force for that protection. Understanding the process through which international concerns involving humanitarian intervention, specifically the use of military force and human rights, (these being the systemic pressures/independent variables) are filtered through domestic structures or institutions, legal and political (the unit level/intervening variables), to produce foreign policy behaviour (the dependent variable) identifies how decision-makers themselves understand the role and purpose of law in the formulation of foreign policy. In that the domestic structures act as a filter to mediate the

tension between the international system and foreign policy.¹¹⁷¹ In this sense, foreign policy will obey certain legal rules which act as a framework to regulate state behaviour, often predisposed by the interests of the international community.

When addressing the question of how states can agree that a particular international legal rule exists but then understand the rights or obligations of that rule in different ways so that the rule arguably functions within the international system. The facts and/or circumstances that resulted in the protection of human rights differed between France and the United States and were based upon the interpretation of the facts provided, including the use of humanitarian language or the absence of such language in the application process relevant to each conflict. While states may agree that a particular international legal rule exists as illustrated in the four empirical cases, the United States and France established foreign policy with their own approaches and understandings to the humanitarian situations under discussion and therefore looked to different legal interpretations and methods toward international law to legitimate its foreign policy.

As suggested in the study's hypotheses, these differences stem from each state's legal framework, the values ascribed to each state's interest position, and on the substantive limits that legislatures have enacted or on which courts have ruled. Since law (domestic and international) is

¹¹⁷¹ Rose 1998; Schweller 2006.

dealt with through a state's legal institutions, decision-makers base their decisions on the appropriate form of interpretation based upon their beliefs about the role of law and the way law is created within each state; this would include sources of law. Thus while the content of the rules of international law (human rights, the use of force and even sovereignty) is the same, the underlying difference is whether the rule meets the criteria of effective legality from within the relevant state and how that criterion is interpreted through the state's legal institutions (chapter two).

As established in chapter two and section four, France and the United States operate within a legal framework that requires legal principles and concepts to act as a framework or guideline, which influence policy and limits the state's choices of whether or not to intervene. In this way, the normative power structures based in the legal traditions of France and the United States constitute how decision-makers interpret international law concerning intervention in the four conflicts. This accounts for how the differences in security [conflict] perceptions impacted the intervening variables concerning interpretation and application relevant to sources of law.

For France, the differences are articulated in domestic law (the French Constitution and Civil Code) and foreign policy that attempts to explain from a legitimate standpoint the problems associated with its colonial history in Africa. Moreover, as Mitterrand's decisions in Rwanda illustrated, what a decision-maker thinks about a security situation often

has more influence on foreign policy than what is actually happening, since that opinion will define foreign policies regardless of whether or not the opinion is valid. This perception was also articulated in Bush's policy regarding non-intervention in Liberia and was reaffirmed during the Clinton administration. In the United States, post-Cold war, Africa was perceived to be marginal regarding global security issues and geo-strategic interests. Bush pushed for intervention in Somalia in response to both the increasing pressure to do something in Somalia and also in response to the political backlash on Bosnia. Clinton ended intervention in Somalia amid the decline of congressional support. This demonstrated that although the structure and the rules of domestic and international institutions will sometimes force change as a result of unforeseen crises or situations, foreign policy will obey certain legal rules which act as a framework to regulate state behaviour. Because many international rules such as those pertaining to human rights have their origins within a state's domestic structure, contextualisation of humanitarian intervention in foreign policy will carry the weight of domestic significance despite its obviously international focus. For the reason that the justification of human rights is based on information as received while the legitimacy of the rights requires authority.

This was clearly the case in both Somalia and Côte d'Ivoire. Somalia represented the first time that human rights violations had been interpreted as a threat to international peace and security and a Chapter 7 intervention was authorised for explicitly humanitarian purposes. The

case of Côte d'Ivoire in particular illustrates the importance of interpretation that could lead to benchmarks of accountability given that *Papon* established legal precedent in French domestic law concerning legal standards associated with humanitarian interventions and complicity. Moreover, although the scope of the rules of France's domestic institution was forced to change France's foreign policy obeyed the legal rules as statutorily prescribed in French law regarding crimes against humanity; as hypothesized and subsequently confirmed by Dworkin's position on the importance of the legal sources. As previously discussed in chapter one, Dworkin's position is that legal interpretation is primarily the interpretation not of the law, but of its sources and to understand why interpretation is central to legal practice requires an understanding of the role of sources in the law; that is, of the reasons for the legal sources in both domestic and international law, which is in accordance with the findings of this thesis.

Similarly however, this thesis does maintain that the case of Somalia lacks established precedent given that consistency in humanitarian actions was not developed. As chapter ten intimates, the Somalia intervention occurred during a transitional period in the international order yet new standards for international action, at both domestic and international levels, were not established. The development and implementation of new standards would have alleviated contemporary arguments surrounding the contradictions between the use of force and sovereignty, as highlighted in chapter seven.

From a legal perspective expanding the scope of international law and therefore its interpretation within the domestic framework would justify legal change; thus representing a development toward a changed scope of state sovereignty with respect to the state and human rights abuses. This is a legal change that neither the Danish Institute Report nor the Responsibility to Protect Doctrine is able to address. Although there is agreed international acceptance that human rights violations should be protected by a responsible international community, these documents do not identify how these principles are to be translated into practice. Indeed, while some states may be willing to intervene to stop atrocities, the international system is reluctant to establish a norm that involves protection under the responsibility to react which may or may not involve the use of force (chapter 7.a.).¹¹⁷² Moreover if these documents were intended to act as enforcement mechanisms, then the strength of their enforcement has not been institutional designed to promote consistent standard practice. In reality this reinforces the divide between the implementation of international norms and how to implement those norms by means of the state. As a consequence protection for civilians caught in intra-state conflict remains uncertain.

In examining the dependent characteristics of international law based upon Christian Tomuschat's assertions, and as concurred by Samantha Besson, noted in chapters one and seven, the research was able to

¹¹⁷² Thesis:181 (Heinze 2011 [online]).

identify how states construct international law politically within foreign policy relating to humanitarian intervention, and how they decide whether or not to use force. This dependency matters since in the case of both states, their legal structures and perceptions of security ultimately determined whether or not they used military force in the course of decision-making. As was demonstrated in section four, the rationale behind the framing of the policy decisions relevant to each conflict stemmed from the differences in information and in the interpretation of the information provided, including use of humanitarian language or the absence of such language. Therefore interpretation compelled both authorization and influence from within each state's distinctive legal framework on the substantive limits the legislature used for enactment of the policy decision. Consequently, humanitarian intervention's dependency on the state's legal structures, on how a state can construct international law politically within its foreign policy, imposes a legal obligation about how authority is constituted and maintained. As demonstrated in the research the failure to understand this dependency may obstruct the rule or norm's effectiveness in the policy decision.

Moreover within the framework of neoclassical realism this thesis has developed an approach by which the state, in utilizing its domestic legal structures as a mechanism for international authority, can allow for structures of hierarchy otherwise absent in the international system. The research has been able to show that through the use of neoclassical realism, systemic pressures create an agenda of reference for decision-

makers (humanitarian situations position international rules/norms in the domestic legal framework) to explain foreign policy. However, these systemic pressures cannot assure relevance similar to a sovereign state's legal and political structures because systemic pressures still have to be identified by decision-makers and codified into the domestic legal system (chapter three). Consequently the codification of a legal norm, by itself, whether customary or conventional, has no meaning. It takes its meaning, as well as its legal value, from the order producing it. This once again draws attention to the function of law, which in any legislative or court system is the right and power to interpret and apply law as prescribed (chapter three).

This gives explanatory power to neoclassical realism's approach in that a state, by interpreting international law through its domestic legal framework, theoretically provides an enforcement mechanism by which international law attains political authority. Given that the domestic legal framework positions how the interpretative process is established and operates between humanitarian concerns and foreign policy. As such, the domestic legal framework will identify the legal scope and/or limitations when establishing international principles for humanitarian concerns within foreign policy. This establishes how we understand sources of law and the strategic use of interpretation and legal reasoning for policy purposes, particularly since decision-makers tend to interpret potential security threats in different ways.

In this way, neoclassical realism does what other international relations theories are unable to do. Instead of simply positing a theory that does not, by itself tell us something about the processes of decision-making, neoclassical realism provides a viable mechanism for states to determine how domestic level processes are capable of assisting systemic information (in this study, humanitarian principles) through foreign policy. Thus as this thesis proposed, in authorising the importance of systemic variables, neoclassical realism allowed for the consideration of systemic factors such as the distribution of capabilities (that is, the capabilities of states to interpret, apply and execute the principles of international law) which form the permissive environment for foreign policy, as argued in chapters one and three. In this way international law regulates the interaction between the state and its position in the international system, through the state's domestic framework. This accounted for the effectiveness of international law within the decision-making process. This is confirmed through the four empirical chapters, in which humanitarian issues became part of the interpretative practice of France and the United States because – as indicated previously – such issues are ruled on from within, through interpretation, rather than from outside the state. Neoclassical realism therefore allows the state, through its legal-political structures, to commit to the fixed limitations of legitimacy in the international legal system while affording the state some degree of control or authority (chapters four and seven).

As hoped this theoretical application moves beyond ‘anarchy is what states make of it’,¹¹⁷³ given that constructivism does not account for unit level factors in foreign policy decisions in the same way neoclassical realism does. Consequentially, the applicability of norm assumption [from the constructivist’s viewpoint] at the international level would be unable to meet the requirements of the humanitarian principles at issue within a state’s decision-making process on its own. This is because Wendt’s constructivist’s argument does not consider the specifics of regional (intra-state) conflict and violence which currently dominate the international system (chapter five). Indeed, this is the theoretical contribution of this thesis. In allocating space to the interpretative process through the state’s unit-level variables, neoclassical realism identifies the way in which a state manages systemic information (i.e., the rules/norms of international law) and how systemic information influences the state’s ability to interpret societal demands and respond effectively to them.

Predictive Power

Given that the subject matter discussed within this research deals with issues which have direct relevance to humanitarian concerns today, and when assessing existing conflicts and the risk of conflict arising in the future, this author is unsure whether the cases under study hold predictive power in decision-making. What can be determined by the

¹¹⁷³ Wendt, Alexander (1992) "Anarchy is what States Make of It: the Social Construction of Power Politics", *International Organization* 46, no. 2 (Spring): 391-425.

case studies is how states perceive and interpret legal and security issues; as well as how the significance or impact of historical connections between countries will affect states that intervene or do not intervene for humanitarian concerns.

In this same regard however when considering predictive power, one must also think of best practice. Can best practice be predictive? Can the international community, and thus states, be sure that what has been prescribed as effective for one conflict will be just as effective for another conflict. Particularly since the focus on morality can conceal structures and practices that enhance further problems. Conceivably the most that can be hoped for is specific awareness of the conflict under concern and understanding the cause of the conflict which is crucial for conciliation purposes. Perhaps the case studies predictive power is best illustrated in highlighting how past decisions came about and still effect current humanitarian intervention concerns. Such as Somalia where the development and implementation of new standards would have alleviated contemporary arguments surrounding the contradictions between the use of force and sovereignty. The Côte d'Ivoire case study gives a glimpse of predictive power. Wherein France had established strong legal behaviour yet illustrates how the importance of interpretation could lead to benchmarks of accountability given that *Papon* established legal precedent in French domestic law concerning legal standards associated with humanitarian interventions and complicity. Yet unless consistent standards and mechanisms are

established the question at the core of humanitarian intervention will remain - which is how to reconcile in the most productive way the degree to which force is used internationally to constrain illegitimate force domestically.

Implications/Suggestions for Future Research

The process of determining how humanitarian intervention as a legitimate practice interacts with the decision-making process, and if humanitarian intervention then becomes, to some extent, an instrument of foreign policy, poses an additional question. If humanitarian intervention becomes an instrument of foreign policy, as this thesis suggests, then the debate concerning intervention changes from whether intervention is legitimate to whether it should be consistently applicable.

As indicated in the findings of this research, although there is international acceptance of the Responsibility to Protect Doctrine (R2P), how these principles are translated into practice has not been identified to ensure that international policy is implemented. Nor are there any established mechanisms which create any legal obligations as to how the principles apply. This has serious implications for R2P since its components continue to complicate intervention decisions. As stated within this thesis, if there is an absence of language or ambiguity then the strength of enforcement has not been institutional designed to promote consistent standard moral or legal practice. The current debate on the use of military force in Syria is a specific example. Syria

illustrates that R2P's reliance on the legal framework of the United Nations may prove to be ineffective in its practical application since intervention decisions only obtain legitimacy from clear and predictable legal standards.

While there may be justifiable benchmarks for humanitarian intervention, in effect a fundamental concern remains - which is to what extent has R2P contributed to the resolution of intra-state violence for humanitarian needs? Moreover, how is the international community able to determine if success has been met if there are no parameters specified to measure success? Certainly inaction into a humanitarian crisis would render Edwards Luck's rationale on United Nations' assistance ensuring a considerable degree of consensus and legitimacy for protection as arbitrary? Luck's argument may clarify and establish inferred standards for humanitarian intervention but it does refer to indeterminable legal obligations. His argument neither explicitly creates nor alters any legal obligations as to how those inferred standards should be applied, particular with regard to the elements obliging the international community (i.e., states) to respond to mass atrocities. Luck only reflects upon legal obligations and as such does not establish any form of legal precedent. The balance between respect for humanitarian concerns and state sovereignty has still not been found.

Consequently, it is not a matter for law to determine or even proscribe any state's moral obligations concerning humanitarian intervention. The

moral obligations of a state, to the extent that they are regulated by international standards, must be a part of other legal obligations which can withstand consistent and uniform applications. It seems that the most contentious aspect of humanitarian concerns is the issues associated with morality. While we would like to believe that society operates by morality, it does not – it operates by law. The moral justification of humanitarian intervention is not hard to find. However, to prove the justification or intention of a situation it is necessary to consider, not: was it wrong? But: was it legal? And, how is that legality interpreted? Moreover, was it legal in established law or by the laws established at the time?

The problematisation of international law's implications within foreign policy opens up possibilities for future research to determine whether these implications are a cause, or a symptom, of larger problems in the international order. Further research possibilities also include whether the United Nations should be used as a legal tool to influence foreign policy or would this weaken the interaction between state law and international law when humanitarian issues arise?

Samantha Besson's work on justifications concerning international human rights and implications associated with religious and non-religious justifications also presents future research possibilities. This is of particular relevance when considering the ongoing "troubles" in Northern Ireland. As are the horrors associated with rape in conflict

given that rape often goes unreported and thus undocumented, causing stigmas that break down societies.

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